No. 20526

United States
COURT OF APPEALS
for the Ninth Circuit

SCHNITZER STEEL PRODUCTS CO.,
a corporation,
Appellant,

v.

AMTRO CORPORATION, S.A., a Panamanian corporation, and CIA. ESTRELLA BLANCA, LTDA., as Owner of the SS NICTRIC,
Appellees.

AMTRO CORPORATION, S.A.,
a Panamanian corporation,
Cross-Appellant,

v.

SCHNITZER STEEL PRODUCTS CO.,
a corporation, and
CIA. ESTRELLA BLANCA, LTDA.,
as Owner of the SS NICTRIC,
Cross-Appellees.

OPENING BRIEF OF APPELLANT, SCHNITZER STEEL PRODUCTS CO.

Upon Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-65

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JURISDICTION

This is an appeal from a final decree (R. 152, et seq.) entered on June 18, 1965, by the Hon. John F. Kilkenny sitting in admiralty in the District Court for the District of Oregon. The decree awarded libelant, as owner of the SS NICTRIC, a total of $48,434.57, plus interest and costs, against Amtro Corporation S. A., the time charterer, for unpaid charter hire and other sums found due under the time charter and as damages for breach of it. Libelant's award ran also against Schnitzer Steel Products Co., as voyage charterer and garnishee. The decree awarded Amtro on its cross-libel against Schnitzer a total of $62,807.10, plus interest and costs, for demurrage, unpaid freight and stevedore damage, all arising out of a shipment of scrap on the NICTRIC from the United States to Japan in 1961. The decree, however, denied Amtro's claim against Schnitzer for consequential damages for alleged breach of the voyage charter party and misrepresentation.

The District Court had jurisdiction of the cause in admiralty under 28 U.S.C.A. Sec. 1333(1), upon the vessel owner's libel in personam against Amtro and in rem against the subfreights and demurrage monies allegedly owed by Schnitzer (R. 1) and under Amtro's cross-libel against Schnitzer for unpaid freight, demurrage and other sums allegedly due (R. 15).

Timely notice of appeal to this Court from the decree of the District Court was filed by Schnitzer Steel Products Co. on July 19, 1965 (R. 187) and by Amtro Corporation S.A. on August 6, 1965 (R. 193). This

Court has jurisdiction of the appeal under 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE

Libelant is owner of the SS NICTRIC, a tramp vessel under Lebanese registration. Libelant entered on July 23, 1961, a time charter (Ex. 1) of the vessel to Amtro Corporation S. A., a Panamanian corporation with offices in Los Angeles. The vessel was delivered to Amtro at San Francisco on August 6, 1961, and charter hire commenced the following day (R. 103).[1]

Amtro at this time was a new company hoping to establish a service between the West Coast and the Far East. The charter of the NICTRIC was its first venture (Tr. 31). It retained the services of a San Francisco charter broker, Ray Kimberk, to arrange a cargo for the vessel (Tr. 32). He contacted Seacharter Company, a Portland charter broker, and negotiations were entered for a voyage charter of the vessel to Schnitzer on a cargo of scrap from the West Coast to Japan (Ex. 79, p. 5 et seq.; Tr. 176 et seq.). It is disputed whether Seacharter Company was acting as an agent of Schnitzer in these negotiations, or acting, instead, as an independent charter broker.

In any event, Schnitzer furnished to Seacharter as a sample for discussion a previous charter party entered by Schnitzer for a scrap cargo shipped on the SS

[1] Libelant will be referred to in this brief as "Owners," the time charterer as "Amtro," and the voyage charterer as "Schnitzer." Page references preceded by "R." refer to the trial court file, and those preceded by "Tr." refer to the transcript of the trial proceedings.

KEHREA (Tr. 177). The provisions of this charter party pertaining to demurrage, including modifications and additions to the original printed language in the charter form, were substantially identical to the charter party finally agreed upon for the NICTRIC (see Exs. 76, 2; Tr. 200). Seacharter sent the KEHREA sample to Amtro by letter dated July 14, 1961 (Ex. 76).

The voyage charter party between Amtro and Schnitzer for the NICTRIC (Ex. 2) is dated July 14, 1961, but was actually signed by Schnitzer on July 25, 1961, and by Amtro shortly after that (Tr. 148-149; Ex. 77). The voyage charter was, of course, for the entire capacity of the vessel, carrying a cargo of scrap from Oregon and British Columbia ports to Japan. Ninety per cent of freight was prepaid, the balance payable upon completion of discharge (R. 105).

Loading of the vessel commenced at New Westminster, B. C., on August 10, 1961, and was completed at Portland on August 26, 1961 (R. 105-106). The vessel arrived in Tokyo harbor and gave notice of readiness to discharge on September 18, 1961 (R. 105). Discharge of scrap there is normally from a berth in the harbor into lighters. Due to congested harbor conditions, the vessel did not receive a discharge berth in the harbor until December 3, 1961 (R. 105), some two and one-half months after her arrival in Japan. Discharge commenced on that date and was completed on December 31, 1961 (R. 105).

Under Clause 18 of the voyage charter, cargo was to be loaded, stowed and discharged within a total of 23 weather working days of 24 hours, Sundays and

holidays excepted unless used, in which case actual time used was to count (R. 105). Under Clause 19, time from noon Saturday until 8:00 a.m. Monday was also not to count unless used. If a longer time than the agreed laydays was used, demurrage was to accrue at the rate of $700 per day (R. 105). No demurrage was incurred in the loading of the vessel, and the demurrage controversy arises entirely out of delay at the discharge port in Japan. It is agreed that the vessel's lay time expired on October 9, 1961, at 1218 hours, and that demurrage began to accrue on that date (R. 105).

The question of Schnitzer's liability for any demurrage at the unloading port involves interpretation of the following clauses of the voyage charter party (Ex. 2) :

"7. Demurrage, if incurred, to be paid by Charterers, at the rate of Seven Hundred Dollars ($700) per day or pro rata for any part of a day.

8. Owners shall have a lien on the cargo for freight, dead-freight, demurrage. Charterers shall remain responsible for dead-freight and demurrage, incurred at port of loading. Charterers shall also remain responsible for freight, and demurrage incurred at port of discharge, *but only to such extent as the Owners have been unable to obtain payment thereof by ex-exercising the lien on the cargo.* [emphasis supplied]

. . . . .

18. Cargo is to be loaded stowed and discharged within a total of twenty-three (23) weather working days of 24 hours. Sundays and holi-

> days excepted unless used, in which case actual time used to count. If longer detained, Charterers to pay demurrage at the rate stipulated in Clause 7 and payments to be made in the same currency as freight payment . . ."

Clause 8 is referred in the lower court proceedings and will be discussed here as the "cesser" or "lien" clause.

The question of Schnitzer's liability for demurrage on weekends and holidays at the unloading port involves interpretation of Clause 19 of the voyage charter party:

> "19. Time from noon Saturday until 8:00 A.M. Monday not to count unless used, in which case actual time used to count. Time from midnight preceding holiday until 8:00 A.M. the day after holiday not to count, unless used, in which case actual time used to count."

The trial court held that this clause applied only during the laydays, and therefore included demurrage for all weekends and holidays in the total demurrage award of $57,757.10 against Schnitzer (R. 144-145, 153). It is agreed that the demurrage charges attributable to weekends and holidays included in the award were $12,-483.00 (R. 105-106).

The NICTRIC cargo was sold by Schnitzer under eight contracts of sale to Japanese buyers (Exs. 16, 18-20, 109-112). The terms of all contracts provided for buyers or receivers of the cargo being responsible for discharge of the cargo from the vessel, with one possible exception (Ex. 110). The contracts with only two of the buyers expressly mentioned liability for de-

murrage at the discharge port. The Okaya company in its contract (Ex. 112) expressly assumed liability for such demurrage, while the Mitsui contracts (Exs. 18 and 19) stated that demurrage at the discharge port was for seller's account.

The ten bills of lading (Exs. 4-13) covering the entire cargo, however, expressly incorporated the terms of the voyage charter party, including, of course, the lien or cesser clause above quoted. Four of the sale contracts expressly provided that charter party bills of lading were acceptable, thus contemplating the incorporation (Exs. 16, 109, 111, 112).

It is agreed that there are unpaid freight charges in the amount of $4,550 (R. 105).

The opinion of the District Court, embodying its findings and conclusions, is reported as *Cia. Estrella Blanca, Ltda* v. *SS NICTRIC,* 247 F. Supp. 161 (1965). The Court held that Clause 18 of the voyage charter party modified and superseded Clause 8, so that the latter was ineffective and that no lien on the cargo was given for unloading demurrage and unpaid freight. This, of course, led to the Court's conclusion that inability to exercise the lien was not a condition to Schnitzer's liability for unloading demurrage and unpaid freight, as provided in Clause 8 (R. 138-140). This construction of the charter party is among the errors asserted on this appeal (see Specification of Error No. 1, infra).

The Court's alternative ground for holding Schnitzer liable for demurrage at the discharge port and unpaid freight was that Clause 8 of the charter party (stating

that inability of Amtro to exercise its lien on the cargo is a condition to Schnitzer's liability "should not be enforced on the record before me" (R. 144). This conclusion of the Court appears to be based upon three subsidiary holdings, all of which are challenged on this appeal (see Specifications of Error Nos. 5 through 11):

1. The implication (never expressly stated by the Court) that Amtro was unable to exercise its lien on the cargo because of congestion in the port of Tokyo (R. 142-144);

2. Amtro could not exercise a statutory lien under Japanese law on cargo while in the hands of consignees within two weeks after delivery, because delivery was to third parties (R. 144); and

3. Amtro was not in a position to assert its lien on the cargo because of representations of Schnitzer until December 7, 1961, that it would be responsible for the demurrage and unpaid freight (R. 140-142, 144).

The following background underlies this alternative holding of the Court.

When Amtro was unable to pay the monthly charter hire due to owners on November 7, 1961, it retained counsel to press its demands upon Schnitzer for immediate payment of or security for the demurrage accruing in Japan (Tr. 51-53, 103). Mr. Fletcher, Amtro's attorney, telegraphed Schnitzer on November 10, 1961 (Ex. 101) that Amtro would make arrangements to exercise the lien on the cargo under Clause 8 of the charter party, unless Schnitzer would guarantee full payment of

the demurrage at the discharge port and unpaid freight. Various negotiations and discussions ensued between Amtro and Schnitzer until December 7, 1961, when Schnitzer's counsel advised Mr. Fletcher to proceed with exercise of the lien, since Schnitzer was unwilling to assume liability for these amounts (Tr. 113-114; R. 141).

Meanwhile, Amtro and Owners had begun in November arrangements for exercise of the lien on the cargo of the NICTRIC (Tr. 110), to be handled through Owners' agents and attorneys in Tokyo, Dodwell & Co. and the McIvor firm, respectively. Dodwell & Co. sent letters to the Japanese consignees on November 27, 1961 (Ex. 113) notifying them of the Owners' instructions to exercise the lien on cargo unless accrued demurrage was paid immediately and further demurrage paid day by day. Dodwell cabled the Owners on December 9, 1961, advising that port congestion in Tokyo would complicate exercise of the lien, and recommended:

> "THEREFORE IMMEDIATE LIENING ACTION INADVISABLE BEST WAIT UNTIL ABOUT 1500 TONS CARGO REMAINING IF LIEN STILL NECESSARY AT THAT TIME." (Dep. Ex. F-4)[2]

This cable was sent six days after discharge of the 9,000 ton cargo had begun on December 3, 1961 (R. 105).

The only attempt found by the Court or shown by

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[2] Depositions taken in Japan were offered in evidence at the trial as Exs. 44A through 44J, inclusive (Tr. 133-135). The offer presumably included the exhibits marked at the time of the depositions, and references to those exhibits are indicated as "Dep. Ex."

the evidence to have been taken to exercise the lien was Dodwell's inquiry to eight Tokyo stevedoring firms on December 12, 1961, about the availability of lighters, with replies that they could furnish none for this purpose (R. 142; Ex. 44E, p. 22; Ex. 44G, p. 160). There are 20 large stevedoring firms and some 50 smaller ones in the Tokyo harbor area (Ex. 44H, p 187-1) No attempt was made to secure lighters from other firms or at other times while the NICTRIC was in Tokyo harbor (Ex. 44E, p. 22, 126 Ex;. 44G, p. 163). No method for exercising the lien was considered or attempted by Amtro or Owners other than discharge into lighters (Ex. 44E, p. 136). No attempt was made to exercise the lien by stopping discharge and holding the cargo on board the vessel (Ex. 44E, p. 59; Ex. 44G, pp. 160, 168), or to inquire about partial discharge for lien purposes at a special 7-day berth (Ex. 44G, p. 168-169; Ex. 44H, p. 187-2, et seq.), or to explore any other means of exercising the lien.

It is Schnitzer's position on the appeal, as in the District Court, that there is no evidence to support the Court's finding that cargo was delivered to third parties, thus preventing exercise of the Japanese statutory lien on cargo in possession of the consignees (R. 144).

The Court found that Schnitzer had led Amtro to believe until December 7, 1961, that it would be responsible for the unloading demurrage and unpaid freight (R. 140-142). Apparently relying on this finding, the Court concluded that "Amtro was not in a position to effectively assert its lien on account of the representations of Schnitzer that the demurrage and unpaid freight would be paid" (R. 144). The total

cargo carried on this voyage was 8,991.142 long tons (Exs. 4-13). On the basis of the prices paid by the Japanese buyers for the cargo delivered to Tokyo, the cargo had an average value in Tokyo harbor of more than $50 per long ton (see Exs. 16, 18-20, 109-112), and a total value of about $500,000 (R. 196). Discharge of the cargo began on December 3, 1961, and was not completed until December 31, 1961 (R. 105). Thus, cargo having more than sufficient value to secure the demurrage and unpaid freight remained on board the vessel until the last week of December, 1961 (see Dep. Ex. B-19).[3]

Amtro at the trial offered the testimony of several witnesses by depositions taken in Japan in an attempt to show that congested port conditions rendered it unable to exercise its lien on the cargo for the demurrage and unpaid freight. This testimony was objected to by Schnitzer as hearsay and conclusion without factual foundation in the evidence. The Court finally determined that Schnitzer's objections should be made after the trial in writing, and apparently admitted the depositions subject to the post-trial objections (Tr. 133-139, 240-243). Although Schnitzer's objections were filed on November 30, 1964 (R. 123, et seq.), the Court failed to announce a ruling on them before its opinion and

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[3] Dep. Ex. B-19 was a cable from Dodwell to Owners on December 26, 1961 that 1200 tons remained on board on that date, and asking whether the lien was to be exercised. At $50 per ton, that amount of cargo would have been worth about $60,000. Owners replied that they were bringing suit against Schnitzer in Portland (which had been filed earlier on December 14, 1961), and instructed Dodwell:

"NEVERTHELESS ENDEAVOUR EXERCISE LIEN VIEW KEEPING VOYAGE CHARTERER RESPONSIBLE UNDER CLAUSE 8 VOYAGE CHARTER." (Dep. Ex. B-2)

findings were handed down on May 25, 1965 (R. 130, et seq.). The Court later on July 7, 1965, rendered a "nunc pro tunc" order (R. 184, et seq.) on Schnitzer's objections. The order in most instances fails to indicate clearly whether objections to particular deposition testimony were sustained or denied. For example, the ruling on Schnitzer's objections on hearsay grounds (R. 125-126) to eight specified portions of the deposition testimony of Amtro's witness Main was as follows (R. 185):

> "Denies the motion to strike the entire testimony of the witness Main.
>
> "Sustains the specific objections to certain of his testimony on the ground that it is hearsay or conclusionary; otherwise, the specific objections are denied."

Thus, it is most difficult to determine whether specific objections were sustained or denied. Since the Court's implied holding that Amtro could not exercise its lien on the cargo necessarily depends upon acceptance of some of the contested evidence in the Japanese depositions, it would appear that many of the specific objections were overruled. In any event, the failure to sustain a number of Schnitzer's objections to deposition testimony relating to attempted lien exercise is specified as error on this appeal (see Specifications of Error Nos. 12-17).

Questions on Appeal

Thus, the specifications of error on appeal deal with the following aspects of the Court's rulings and findings

underlying its decree holding Schnitzer liable for the demurrage and unpaid freight:

1. Whether the Court misconstrued the voyage charter party in holding that Clause 8 (the lien or cesser clause) was modified out of existence by Clause 18, so that there was no lien given on the cargo for demurrage and no condition of Amtro's inability to exercise the lien before Schnitzer could be liable (Specifications of Error Nos. 1-4).

2. Whether the Court erred in holding either that Amtro should not be held to the condition of exercising the lien or (by implication) that it had been unable to exercise the lien, within the meaning of the charter party cesser clause (Specifications of Error Nos. 5-9, 11).

3. Whether there was evidence supporting the Court's finding that cargo was delivered to third persons, not to consignees, thereby preventing exercise of the Japanese statutory lien upon the cargo in possession of the consignees (Specification of Error No. 10).

4. Whether the Court erred in admitting and relying upon certain evidence relating to the alleged inability to exercise the lien on the cargo (Specifications of Error Nos. 12-18).

5. Whether the Court misconstrued Clause 19 of the charter party in failing to exclude unused weekends and holidays throughout the demurrage period from computation of the demurrage, which accounted for $12,483 of the total demurrage awarded against Schnitzer in the amount of $5,757.10 (R. 105-106; Specification of Error No. 19).

Objections to the Court's findings and conclusions, as embodied in its opinion (R. 130 et seq.), were made by Schnitzer's motion for reconsideration and objections to findings (R. 155 et seq.). These were overruled by the Court (R. 182-183). Objections to admission of evidence in the form of deposition testimony were raised, as previously indicated, by post-trial motion (R. 123, et seq.) entered after the decree was filed.

SPECIFICATIONS OF ERROR—GROUP I

Construction of Charter Party

1. The Court erred in entering a decree (R. 153) against Schnitzer Steel Products Co. for any sum other than $500 stevedore damage admittedly due (R. 106), in that the Court's conclusion that Clause 8 (cesser clause) was not a part of the charter party between Amtro and Schnitzer, was an erroneous construction of the charter party and based upon the erroneous findings of fact and conclusions of law specified below in Specifications of Error Nos. 2, 3 and 4.

2. The Court's finding and conclusion (R. 140) that Schnitzer was the author of the charter party and chargeable with its form, language, deletions and endorsements is unsupported by substantial evidence and clearly erroneous.

3. The Court's finding (R. 141) that Schnitzer's counsel took the position from November 17, 1961, until after completion of discharge of the cargo on December 31, 1961, that Amtro had no lien on the cargo for demurrage is unsupported by substantial evidence

and clearly erroneous, there being no evidence that Schnitzer's counsel ever took such a position.

4. The Court's finding and conclusion (R. 142) that all of Schnitzer's contracts for sale of the cargo (Exs. 16, 18, 20, 109, 110, 111 and 112), with one exception, provided that demurrage at the discharge port was for seller's (Schnitzer's) account is unsupported by evidence and a clearly erroneous construction of all the contracts, except the two contracts with Mitsui (Exs. 18 and 19).

SPECIFICATIONS OF ERROR—GROUP II

Failure to Exercise Lien on Cargo

5. The Court erred in entering a decree (R. 153) against Schnitzer for any sum other than the $500 stevedore damage admittedly due (R. 106), since the Court erred in concluding (R. 144) that Clause 8 (cesser clause) of the charter party, requiring Amtro to exercise its lien on cargo for demurrage and unpaid freight as a condition to Schnitzer's liability therefor, should not be enforced against Amtro, said conclusion being based upon erroneous findings of fact and evidence erroneously admitted as specified below in Specifications of Error Nos. 6 through 18, inclusive.

6. The Court's finding (R. 142, 143) that exercise of the lien by holding the cargo on board the vessel would probably have caused the Japanese harbor authorities to move the vessel from its discharge berth and to prevent further discharge of cargo until after 50 to 100 other ships had discharged, is unsupported by substantial evidence and clearly erroneous.

7. The Court's findings (R. 143) that Schnitzer tried unsuccessfully to arrange for the discharge of the NICTRIC at "another [Harumi] wharf and that the lien could not have been exercised by discharge of cargo there is unsupported by substantial evidence and clearly erroneous.

8. The Court's finding and conclusion (R. 144) that Japanese port authorities would not have permitted the use of lighters for exercise of the lien on the cargo is unsupported by substantial evidence and clearly erroneous.

9. The Court's finding (R. 143-144) that no bonded storage space was available for exercise of the lien on cargo is unsupported by substantial evidence and clearly erroneous.

10. The Court's findings (R. 142-143, 144) that the consignees of the cargo had transferred title to the cargo to third persons and that third persons acquired possession of the cargo upon its discharge from the vessel, thus preventing exercise of the Japanese statutory lien, are unsupported by substantial evidence and clearly erroneous.

11. The Court's finding and conclusion (R. 144, 140-141) that Amtro was not in a position to assert effectively its statutory lien under Japanese law on the cargo, "on account of the representations of Schnitzer that the demurrage and unpaid freight would be paid," is unsupported by substantial evidence and clearly erroneous.

12. The Court erred in failing specifically to sustain Schnitzer's objections and motion to strike the fol-

lowing testimony by deposition (Ex. 44E) of Amtro's witness Saishoji:[4]

(a). Ex. 44E, p. 23, line 9 through the end of the page:

"Q. (by Mr. Fletcher) On the basis of your experience at that time, and knowledge, was there any time during December of 1961 when it would have been possible to obtain lighters with which to discharge this cargo from the vessel, other than discharge to the regular consignees?

A. No, I don't think so.

Q. Would it, on the basis of your knowledge and experience, and daily concern with the problem at that time, was there any time within December of 1961 where it would have been possible to obtain storage space for this cargo?

A. We tried similar actions on other ships, but at that time since September 1961 up to March of 1962, it was a very difficult time to arrange any lighters from shipping agent because even for the consignees themselves it was extremely difficult to get lighters for their own cargo, and we are not customers for the lighter owners and also we are not customers for the stevedoring companies in Tokyo because we only handled quite a lot of trampships and free-out terms, therefore the stevedores concerned usually they gave priority in giving lighters to their own customers. That is why I don't think we could get any lighters from stevedoring companies in Tokyo at that time, even in January or February next year—1962, I mean."

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[4] The page and line references in all the following specifications refer to the specific material subject to the motion or objection. Material preceding or included in the following quotations for the purpose of understanding the testimony and objection, but not subject to the motion to strike or objection, is in brackets.

(b). Ex. 44E, p. 24, lines 6-10, and line 23 through p. 25, line 4:

"[Q. (by Mr. Fletcher) You mentioned early in your testimony the fact that you could not get bonded warehouse space in which to put this scrap. Why was bonded warehouse space necessary?]

A. If, in order to exercise lien on the cargo, owners must discharge cargo into bonded warehouse or shed, because the cargo was imported from abroad and Customs Office do not allow discharge any other place.

[Mr. Lewis: Just for the record, I would like to make objection here that this entire line of testimony is irrelevant to the issues in the case, and constitutes opinion evidence.]

. . . . .

[Q. (by Mr. Fletcher) I notice that, Mr. Saishoji, that in your Exhibit F-4, you advised owners that the action of ceasing discharge and holding the cargo in the ship would result in port authorities' ordering 'Nictric' out of berth, necessitating awaiting turn later for reallocation of the berth. What was the basis of your information on that subject?]

A. When ship came in at Tokyo for discharge of scrap cargo, I think that Tokyo Harbour authorities nominated 5 or 6 berths for discharge of scrap cargo, and so many ships with scrap cargo waiting for berth outside the Harbour, in order of ship's arrival, so the berth was assigned to the ship in order of the time of ship's arrival in Tokyo, so when any berth was nominated to a ship she had to discharge her cargo as soon as possible to vacate berth for other ships which were waiting for berth. So if we cease discharge in the Harbour, then the Port authorities do not agree to keep the

ship in Harbour. And maybe they requested the ship to go outside Harbour to wait further allocation of the berth."

(c). Ex. 44E, p. 57, lines 29-33:

"[Q. (by Mr. Lewis) That if the ship had stopped discharge it would have lost berth. That's merely your opinion.]

A. No, that was advised by the Port authorities—for example, if we don't work two days here inside the harbour, harbour authority give instructions why no work here, and similar stoppage happened in Yokohama and they actually—ship was ordered to go outside."

(d). Ex. 44E, p. 34A, line 3 through p. 35, line 17:

"Q. (by Mr. Fletcher) Mr. Saishoji, as a practical matter, would it have been possible to seize and stop delivery of the cargo while it was in the lighters which took the cargo from the vessel to wherever it was going? That is, to stop the lighters and make them hold the cargo instead of delivering.

A. No, I don't think so, because the lighterowners, they let the lighters hire to the others on the basis of lighterage that cargo was to be discharged as soon as possible and if we request exercise lien on the cargo in the lighters they only get a small amount of demurrage per day instead of the rate of lighters. So, the lighterowners, usually they don't agree in such circumstances of acute shortage of lighters in port.

Q. Under the condition at that time with the acute shortage of lighters, would the harbour authorities have let you do something like that, that is, tie-up a set of lighters for a while?

Mr. Lewis: I would like to register a contin-

uing objection.

A. I don't think so."

(e). Ex. 44E, p. 65, lines 10 through 24, and p. 66, lines 1 through 10 and 16 through 31:

[Q. (by Mr. Fletcher) To earlier this year in the summer or early fall, did you, at that time, inquire of the various consignees of the cargo of the 'Nictric' what the terms were on which they have sold the cargo to the steel mills?

[A. You mean when?

[Q. Well, did you, at any time, in, ah, inquire of the consignees, ah, no strike that. Did you at any time, this year, not 1961, this year, inquire of the consignees what terms they, they had sold the cargo to their ultimate consumers on?

[A. Yes, I have asked.

[Q. When were those inquiries made?

[A. I think I have . . .

[Q. Approximately, it doesn't matter exactly.

[A. That August, I think.]

Q. I see. And what did the consignees tell you at that time?

A. They told us that the cargo, their cargo was already sold to consumers and the details of the, their contracts they don't give us, but usually when they purchase a cargo from abroad . . .

Mr. Lewis: I object to anything now.

A. . . .also make contract with the consumers.

Q. Apart from, I'm not interested now in the price and other details, but did they tell you the delivery terms on their contracts with their consumers?

A. They said some of consignees, their cargo delivery upon ship's arrival on board on 'Nictric.'

. . . . .

[Q. Well, now, Mitsui said, when you asked Mitsui about this, what did they tell you about delivery terms on which they had sold the cargo to the steel mills?]

A. Some lot of the cargo was sold to their consumers from discharge on discharge from 'Nictric' to lighters and some cargo on board lighters. I think two items they mentioned.

Q. So that some of it was on the discharge into the lighters, and the other part was on the lighters.

A. Yes.

Q. Was the place where delivery was to be made to their customers.

A. Yes.

. . . . .

[Q. In the case of Toyo Menka, what did Toyo Menka tell you?]

A. They also sold the cargo to the customers, consumers, but they don't mention exactly the date of delivery, and place of delivery, but they said, only they said the cargo was sold to the consumers.

Q. Did they say whether or not the cargo had been sold by the time the vessel arrived?

A. Yes, they said already sold.

Q. Now, in the case of Okaya & Co., what did they tell you?

A. I remember that the cargo was already sold to the consumers but they don't mention the details.

Q. And in the case of Nomura Trading Company, what did they tell you?

A. When I checked the consignees, 7 consignees they all replied cargo was already sold to the consumers. So, the same reply."

As directed by the Court (Tr. 136-137, 240), Schnit-

zer's objections to the foregoing testimony were by written motion, as follows (R. 123, 124-125):

"III

"Moves to strike the entire testimony of Kimitoshi Saishoji relating to demurrage and attempts to exercise the lien except for his contact with stevedores for the reason that the witness himself testified that he had no personal knowledge. (See p. 124, line 21 through p. 130, line 10; p. 134, lines 14-19, p. 135, lines 14-16).

"If the motion to strike the entire testimony other than his testimony relating to contact with stevedore companies is denied. Schnitzer moves to strike the following portions of testimony upon those grounds and/or that the best evidence was not offered:

. . . . .

P. 24, line 23 through p. 25, line 4.

P. 23, line 8 through end of page.

P. 34A, line 3, through p. 35, line 17, for the additional reason that the testimony is speculative and opinion evidence which is not admissible upon questions of fact.

. . . . .

P. 24, lines 6-10.

. . . . .

P. 57, lines 29-33, hearsay, opinion and supposition.

P. 65, lines 10-24.

P. 66, lines 1-10, 16-31."

The Court's ruling on these objections was by nunc pro tunc order (R. 184 et seq.) after its opinion was rendered, as follows:

"III

"Denies the motion to strike the entire testimony of the witness Kimitoshi Saishoji, for the reason that some of the testimony is relevant and material to the issues in the case.

"Sustains the specific objections to the testimony of said witness on the ground that the same was hearsay or opinion evidence; otherwise, the specific objections are overruled."

13. The Court erred in failing specifically to sustain Schnitzer's objection and motion to strike the following testimony by deposition (Ex. 44F) of Amtro's witness F. A. L. Morgan:

Ex. 44F, p. 77, lines 11 through 21:

"Q. (by Mr. Fletcher) About December 8, did you inquire concerning obtaining lighters, space, etc., for exercising lien on cargo?

A. Yes. In the company of principal of John Manners, we interviewed stevedore representative in Tokyo area, and as inquiries were made at that time, we understood that was a very great shortage of lighters which normally are required for scrap and that it was almost impossible to find storage arrangements on shore and that it would be unfeasible under most circumstances to exercise lien—this was the opinion of the stevedore."

Schnitzer's objection was by written motion (R. 125) as follows:

"IV

"Moves to strike the entire testimony of F. A. L. Morgan on the subjects of demurrage and attempts to exercise a lien on the ground that by the

testimony of the witness himself he did nothing, except for talks with stevedores, to exercise a lien on the cargo. (See p. 152-3, lines 16-23).

"Moves to strike the following based on hearsay and speculation:

. . . . .

"P. 77, lines 11-21 and on the additional ground that the answer constitutes the opinion of a third party as stated by the witness himself."

The Court's ruling was by nunc pro tunc order as follows (R. 185):

"IV

"Denies the motion to strike the testimony of the witness F. A. L. Morgan.

"Sustains the specific objections on the ground of hearsay or where the same may be opinion evidence; otherwise, the specific objections are denied."

14. The Court erred in failing to sustain Schnitzer's objection to Deposition Ex. B-11, a letter dated January 19, 1962, from Amtro's agent F. A. L. Morgan to Amtro's manager Stewart stating, inter alia, that Schnitzer's Tokyo representative had unsuccessfully attempted to arrange for discharge of the NICTRIC out of turn at a special quick discharge berth.

Schnitzer's objection was by written motion as follows (R. 127-128):

"VIII

"Schnitzer objects to the following documentary evidence appended to the depositions taken in Japan upon the ground that said exhibits are incom-

petent, irrelevant and immaterial, constitute hearsay and are not binding on Schnitzer:

"B-11 (consisting of three pages)."

The Court's ruling was by nunc pro tunc order as follows (R. 186):

"VIII

"Overrules the objections to the introduction of Exhibits F-23 and B-11, the former being part of a record kept in the usual course of business and the latter having general background relevancy."

15. The Court erred in failing to sustain Schnitzer's objection to Deposition Ex. F-23, a newsletter of Pacific Marine Corporation, which is described in the Court's opinion at R. 143 as refuting the availability of bonded storage space in Japan for exercise of the lien on cargo.

Schnitzer's objection was by written motion (R. 127-128) as follows:

"VIII

"Schnitzer objects to the following documentary evidence appended to the depositions taken in Japan upon the ground that said exhibits are incompetent, irrelevant and immaterial, constitute hearsay and are not binding on Schnitzer:

. . . . .

F-23 (consisting of seven pages)."

The Court's ruling was by nunc pro tunc order as follows (R. 186):

"VIII

"Overrules the objections to the introduction of Exhibits F-23 and B-11, the former being part of a record kept in the usual course of business and the latter having general background relevancy."

16. The Court erred in failing specifically to sustain Schnitzer's objections and motion to strike the following testimony by deposition (Ex. 44G) of Amtro's witness Main:

(a). Ex. 44G, p. 160, line 21 through the end of the page:

"[Q. (by Mr. Baillie) What about attempting to retain cargo in the ships in order to exert a lien? Could that have been done?]

A. The only way of retaining the cargo in the ships is to cease discharging, which meant, at that time, that the ship risked the extreme probability of being moved away, in fact, we were told by the port authorities at a number of ports in Japan, that the ships would be moved out of berth and sent to anchor outside and when the ships would be brought back was a matter of conjecture, they would quite easily have to wait their turn and there were bigger ships waiting to come in to discharge."

(b). Ex. 44G, p. 161, lines 6-9:

"Q. (by Mr. Baillie) Oh, I should have asked you before, as a general question, were you ever able to impress a lien upon the cargo of the 'Nictric'?

A. On the 'Nictric', no."

(c). Ex. 44G, p. 173, lines 27-29:

"[Q. (by Mr. Lewis) Well, let me ask you, how do you go about liening a cargo after discharge?

[A. Is it relevant if this is not possible.

[Q. Yes certainly. I want to know why you say it's not possible.]

A. Well, I say it was not possible because there

was no storage space ashore, and, nor could we get barges to hold it in the barges or the lighters."

(d). Ex. 44G, p. 177-3, line 9 through p. 177-4, line 18:

"Q. (by Mr. Fletcher) Mr. Main, I take it there was, the harbor authorities in the Tokyo area were interested in relieving congestion as quick as possible, is that correct, according to your acquaintance and experience in these things?

A. Yes.

Q. And one of the main sources of congestion was shortage of lighters?

A. Yes.

Q. On the basis of your general acquaintance with the situation then, do you believe that the harbor authorities would have allowed anyone to tie up lighters for a period of several days for the purpose of liening cargo while in the lighters and holding them in the lighters for that purpose?

Mr. Lewis: I object to that question.

A. We ascertained on a number of occasions and in a number of ports in Japan that the authorities will not permit lighters to be tied up.

Q. Now Mr. Main this. You previously stated that you had ascertained that the port authorities would, would take a vessel out of berth and make her go back to the end of the line if she stopped discharging. To your knowledge and on the basis of your acquaintance, with conditions then, was this just as true when she only had 1500 tons more to discharge as when, as in the beginning? Did it make any difference when in the discharge this occurred?

A. Not as far as we were aware. We were given to understand that throughout this job, that still applied.

Mr. Lewis: What still applied?

A. The ship, if she ceased discharging would be moved out of the berth in order to make way for another ship to be discharged.

Q. Now, these special berths for quick seven day discharge Mr. Lewis was asking about, were these berths on which one would not be allowed to store cargo or store the cargo for any length of time?

Mr. Lewis: Ask him if knows, if you know.

A. I don't know definitely. I can only say this is extremely doubtful cargo would be permitted to lie alongside on the pier. I don't think any cargo is allowed to lie on the pier for a long period.

Mr. Lewis: I object to all of that, everything.

Q. Well, was there at this time a shortage of custom warehouse facilities in which to place the cargo?

Mr. Lewis: Please define customs warehouse areas.

Q. Any area which would be proper, which the Japanese authorities would consider proper and possible, within which to put cargo, pending its delivery to consignees who cleared it through customs.

A. Yes, it was a definite fact that at that time that the facilities were not available for the cargo to be held for a lien."

(e). Ex. 44G, p. 177-6, lines 9 through 19:

"Q. (by Mr. Baillie) Mr. Main, when you say a vessel might be sent out by the officials in charge, out of berth, again to wait her turn, she would take her turn with the last vessel arriving in port, would she not? After the last vessel arriving in port, isn't that what is meant by sending her out of berth to . . .

A. Yes. To take her turn with the ships then lined up outside.

Q. And she would follow the last one in line.

A. She'd be the last in line.

Q. And of course you did have knowledge of when the last ship came into port, did you not?

A. Yes. We had knowledge of when the last ship came into port and we continually had knowledge of the prospects of waiting for that last ship."

Schnitzer's objections were by written motion, as follows (R. 125-126):

"V

"Moves to strike the entire testimony of Main relating to demurrage and attempts to exercise a lien on the cargo, except for testimony relating to a November 27th letter to the consignees for the reason that by the witness' own testimony he personally did nothing to lien the cargo (see p. 162, line 30, p. 163, lines 17-18, p. 172, lines 19-24) and that he could not recall what he personally had to do with attempts to lien the cargo. (See p. 162, lines 7-10)

"Moves specifically to strike the following:

. . . . .

"P. 160, lnes 21 through end of page on the ground that it is hearsay.

"P. 161, lines 6-9, on the ground that the alleged testimony is a conclusion, and the witness testified that he personally did not do anything to exercise a lien. (See p. 162, line 30, p. 163, lines 17-18, p. 172, lines 19-24).

"P. 173, lines 27-29, on the ground of hearsay. (See p. 174, lines 3-10).

"P. 177-3, line 9 through 177-4, line 18, on the grounds of no personal knowledge, the answers constitute hearsay evidence, and are at best statements of conclusions.

"P. 177-6, lines 9-19, on the ground that the evidence is speculative and hearsay."

The Court's ruling was by nunc pro tunc order, as follows (R. 185):

"V

'Denies the motion to strike the entire testimony of the witness Main.

"Sustains the specific objections to certain of his testimony on the ground that it is hearsay or conclusionary; otherwise, the specific objections are denied."

17. The Court erred in failing specifically to sustain Schnitzer's objections and motion to strike the following testimony by deposition (Ex. 47) of Owner's witness, Captain Cassimatis:

(a). Ex. 47, p. 19, line 23 through p. 20, line 9:

"Q. (by Mr. Tatum) And were you able to exercise a lien on the cargo of the NICTRIC?

A. No.

Q. Why not?

A. Because according to the advice available which was the best advice at the time for me, which was namely McIver and Dodwell, it was impossible to do that sort of thing in Japan.

Q. Why was it impossible?

A. Why, I couldn't tell you definitely. The idea was that the congestion was terrific. There were no lighters, there was no warehousing, there was no

space where to put this cargo, and the thing was simply not feasible."

(b). Ex. 47, p. 44, line 25 through p. 45, line 9, and p. 45, lines 20-22:

"[Q. (by Mr. Lewis) You didn't know what efforts were being made at that time by Mr. Main?]

A. What I know, I know that I went myself with Main twice at McIver's and once alone, and I was pushing along all the time seeing what we could do about leaving [sic] the cargo, and then both McIvors and Main told me, 'Sorry, old boy, we cannot do anything about leaving [sic] the cargo, for the simple reason that this cargo has been sold on different terms than the ordinary terms.' It has been sold on, whatever you say, CQ—

Q. CQD?

A. CQD. And of course we have no handle . . . but according to what both Dodwell and McIver told me, they couldn't leave [sic] the cargo because there was no handle to press this."

(c). Ex. 47, p. 51, lines 6-9:

"A. (by Captain Cassimatis, on cross-examination) . . . But what I am a hundred per cent sure, from the advice of the Club, which was McIver, and advice of Dodwell, which is Main, but perhaps his general manager behind him, was that there was no chance of liening the cargo."

(d). Ex. 47, p. 59, line 23 through p. 60, line 13:

"Q. (by Mr. Tatum) Now, in this instance of the NICTRIC, to clear up this advice from McIver and Dodwell, did they advise you that under the terms of the voyage charter and the contracts, you had no claim against the receivers for demurrage?

A. That's so, that is correct.

Q. Now, that's one claim that you received advice on. Now, did they likewise advise you that you had no right to lien the cargo because of the shortage of facilities?

A. That is correct.

Q. So those were the two pieces of advice that they gave you?

A. Which to me was sufficient at the time, because it was the best thing I could get.

Q. And that was advice from the Club's lawyer, McIver, in Tokyo?

A. That's right.

Q. And advice from Dodwell & Company?

A. That is correct."

Schnitzer's objection was by written motion as follows (R. 127):

"VII

'Moves to strike the testimony of G. Cassimatis in the following particulars:

"P. 19, line 23 to p. 20, line 9, on the ground that the witness had no personal knowledge, that his testimony is based on hearsay and expresses opinions and conclusions on matters depending on facts in issue. (See p. 43, line 24 to p. 44, line 17, p. 54, lines 7-11).

"P. 44, line 25 through p. 45, line 9, 20-22, on the ground that the testimony is hearsay, speculative, non-responsive, and tends to prove no issue in the case.

"P. 51, lines 6-9, on the ground that the testimony is hearsay and non-responsive.

. . . . .

'P. 59, line 23 through p. 60, line 13, on the ground that the testimony is hearsay."

The Court's ruling was by nunc pro tunc order as follows (R. 185-186; see also Tr. 18-25):

"VII

"Sustains the objections to the testimony of the witness G. Cassimatis insofar as the same is hearsay and conclusionary."

18. The Court erred in failing to sustain Schnitzer's objections to discharge reports, Exhibits 26, 27 and 23, as follows (Tr. 10-12):

"MR. TATUM: Now, if your Honor please, I would like to offer . . . Exhibit 26, which is the discharge report in Tokyo for one of the Mitsui contracts, and No. 27, which is likewise a certificate of discharge for the other Mitsui shipment in Tokyo. Also, Exhibit 23, which is the discharge survey report for a shipment to the Iwai company.

THE COURT: Any objection?

MR. KRAUSE: Your Honor, could we have a statement as to the purpose of this offer?

THE COURT: All right. Make your statement . . ., Mr. Tatum.

. . . . .

THE COURT: And No. 26?

MR. TATUM: Exhibit 26 is the discharge report showing the surveyors in Japan who surveyed and measured these turnings. It shows the delivery was on behalf of Mitsui, but it shows what was delivered and where. It relates to Mr. Krause's claim that we could have exercised a lien in the hands of Mitsui. This proves it was never delivered to Mitsui.

THE COURT: And 27?

MR. TATUM: The same is true of 27 and the same is true of 23.

THE COURT: All right, Mr. Krause.

. . . . .

MR. KRAUSE: May I say one word about the last one of these exhibits?

THE COURT: That would be 26, 27 and 23.

MR. KRAUSE: Those reports do not show that the cargo was not delivered to Mitsui. I mean, you can't take a report of that sort and by that prove that the cargo went into the hands of an innocent purchaser for value.

THE COURT: Mr. Krause, I believe that is a question of argument as to the interpretation of the instrument itself. They will be admitted."

SPECIFICATIONS OF ERROR—GROUP III

Erroneous Calculation of Demurrage

19. The Court erred in failing to exclude from the amount of demurrage awarded against Schnitzer the sum of $12,483 (see R. 105-106) for demurrage charges attributable to weekends and holidays after lay time had expired, by erroneously construing (R. 144-145) Clause 19 as applicable only to the laytime period, and not to the demurrage period after the expiration of the laydays.

SUMMARY OF ARGUMENT

1. Clause 8 (lien or cesser clause) of the voyage charter party defines the liabilities of the parties for demurrage, and was not modified by Clause 7 or 18 of the charter party.

2. Since the charter party, including Clause 8, was

incorporated in the bills of lading, the receivers of the cargo were liable for the unloading demurrage and unpaid freight, and Schnitzer was liable only to the extent that Amtro was unable to exercise its lien on the cargo for these sums.

3. Amtro failed to exercise the lien, and there is no substantial evidence of any real or good-faith effort by Amtro or Owners to do so; the condition to Schnitzer's liability was therefore not met.

4. If Schnitzer was liable for the demurrage and unpaid freight, Clause 19 provides that demurrage was not to run on weekends and holidays, and the amount recoverable against Schnitzer was $12,483 less than the $57,757.10 awarded by the Court.

ARGUMENT

I

The District Court erred in construing the voyage charter party to the effect that Clause 8 (lien or cesser clause) was inoperative.

(Specifications of Error Nos. 1-4)

Clause 8, the lien or cesser clause, of the voyage charter party (Ex. 2) between Amtro and Schnitzer provided:

> "8. Owner shall have a lien on the cargo for freight, dead-freight, demurrage. Charterers shall remain responsible for dead-freight and demurrage incurred at the port of loading. *Charterers shall also remain responsible for freight, and demurrage incurred at port of discharge, but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.*" (Emphasis supplied)

Under this clause, the liability of Schnitzer for unpaid freight and demurrage at the discharge port was only secondary, conditioned upon Amtro being unable to obtain payment from the receivers of the cargo by exercise of its lien.

The District Court held (R. 138-142) that the cesser clause and its limitation upon Schnitzer's liability was ineffective, because modified by Clauses 7 and 18, which the Court interpreted standing alone as imposing unconditional liability for unloading demurrage and unpaid freight upon Schnitzer. Clause 7 provided:

> "7. Demurrage, if incurred, to be paid by Charterers at the rate of Seven Hundred Dollars ($700) per day or pro rata for any part of a day."

Clause 18 provided:

> "18. Cargo is to be loaded stowed and discharged within a total of twenty-three (23) weather working days of 24 hours. Sundays and holidays excepted unless used, in which case actual time used to count. If longer detained, Charterers to pay demurrage at the rate stipulated in Clause 7 and payment is to be made in the same currency as freight payment . . . "

The Court reached this interpretation of the charter party on four grounds:

1. Clause 18 was an addition to the original printed form of the charter party (R. 138-139);

2. Schnitzer was the author of the charter party and chargeable with its form, language, deletions and endorsements (R. 140);

3. Schnitzer agreed with the Court's interpretation of the charter party until December 7, 1961, when Schnitzer denied responsibility for the sums in dispute (R. 140-142); and

4. Schnitzer's contracts for sale of the cargo to its Japanese consignees provided, with one exception, that demurrage at the discharge port was for seller's (Schnitzer's) account (R. 142).

Schnitzer submits that the first of these grounds is irrelevant, since Clause 18 does not conflict with Clause 8, and that the second, third and fourth grounds, as well as the Court's overall construction of the charter party provisions on liability for demurrage and unpaid freight, are erroneous.

Cesser Clause-Historical Background

A correct interpretation of Clause 8 and the charter-party provisions on unloading demurrage should take into account the historical use of the cesser clause in charter parties.

Vessels engaging in international trade have traditionally sailed under charter parties containing a cesser clause (Tr. 156), usually in substantially the following terms:

> "Charterers' responsibility to cease when cargo is all on board and bills of lading signed, but master or owners to have an absolute lien on cargo for freight, deadfreight and demurrage."[5]

The cesser clause, when the charter party terms are

[5] Quoted from the charter party construed in *The Hans Maersk*, 266 Fed. 806, 808 (CCA 2, 1920).

incorporated in the bills of lading, is construed to impose liability upon the receivers of the cargo for demurrage and unpaid freight at the unloading port. Charterer's liability ceases upon loading of the cargo, except to the extent that the lien given to the vessel covers less than ("are not commensurate with") the liability which it is intended to secure. This is well-settled law under the standard cesser clause. See, *e.g., Yone Suzuki* v. *Central Argentine Railway,* 27 F.2d 795 (C.C.A. 2, 1928), cert. den. 278 U.S. 652; *The Hans Maersk,* 266 Fed. 806 (C.C.A. 2, 1920); *Crossman* v. *Burrill,* 179 U.S. 100, 45 L. Ed. 106, 21 S. Ct. 38 (1900); Tiberg, THE CLAIM FOR DEMURRAGE (1962), pp. 15 *et seq.*[6]

The basic printed voyage charter party in this case (Exs. 2, 75) is the GENCON form which has been in use since 1922, and is commonly employed for scrap cargoes (Ex. 79, p. 29; Tr. 177, 198). Its cesser or lien clause (Clause 8), when the charter party is incorporated in the bills of lading, creates substantially the same liabilities for demurrage as the more common cesser clause in other charter party forms: demurrage at the discharge port becomes the liability of the receivers of the cargo, and the charterer remains responsible for it only to the extent that the lien given to the vessel cannot be exercised against the cargo. Compare the similar interpretations and results under the two

[6] This excellent work totaling 95 pages by Swedish Professor Hugo Tiberg is published by Stevens & Sons, Ltd. of London. It deals succinctly, but with citations to and discussions of the legal authorities, with demurrage law of the United States, as well as of other maritime countries. It is the most helpful work on demurrage that we have been able to find.

forms of cesser clause in *The Arizpa,* 63 F.2d 42; (C.C.A. 4, 1933), cert. den. 290 U.S. 648, and *The Luossa,* 1936 A.M.C. 213 (Arb., 1935).

Thus, the legal effect of the cesser clause, both in its more common form and in the GENCON form, and its incorporation into the bills of lading, is to allocate liability for unpaid freight and demurrage at the discharge port to the receivers of the cargo, and to charge the vessel with the duty of collecting it from them by exercise of the lien. Only if the lien cannot be exercised, so that the vessel's remedy becomes illusory, does the charterer remain liable for such amounts. This doctrine soundly recognizes that receivers of cargo under the usual sale contracts and bills of lading have the power to and do control the discharge of the vessel. See *The Hartismere,* 1937 A.M.C. 594, 598, 18 F. Supp. 767 (D. Md. 1937). This allocation of unloading demurrage liability created by the cesser clause and its incorporation into the bills of lading places incentive on those responsible for discharge to accomplish it with a minimum of delay.

Thus, the requirement that the vessel exercise its lien for demurrage on cargo of the receivers is not merely a *pro forma* condition to holding the charterer responsible, but an agreement of the vessel to collect unloading demurrage and unpaid freight from the consignees, the parties primarily liable for it, at a time when the pressure is greatest upon them to meet that liability. If the ship fails to require the receivers to pay the demurrage at this time, the complexities arising from the location of the shipper and buyers in different

countries with variant legal systems may make it difficult or impossible for the charterer-shipper to enforce the buyers' ultimate liability for the demurrage.

Changes in Original Printed Form Do Not Alter Operation of the Cesser Clause

The District Court held that Clause 18, added to the original printed form, and the alteration of the original printed form of Clause 7 of the voyage charter party conflicted with and modified the allocation of liabilities of the cesser clause (R. 138-140). The Court's construction of the charter party is, we submit, plainly erroneous.

The Court found conflict in Clauses 7 and 18 with Clause 8 by quoting only a portion of two sentences in the first two of those clauses, thus destroying their context: "demurrage, if incurred, to be paid by Charterers" (from Clause 7); "Charterers to pay demurrage at the rates stipulated in Clause 7" (from Clause 18). Referring to its quotation of these two portions of sentences from Clauses 7 and 18, the Court stated:

> "Thus, in the typewritten provisions, the charterer has not only once, but twice, made *an unqualified promise* to pay the demurrage." (R. 139, lines 9-11, emphasis supplied; see also R. 140, lines 2-4.)

By placing periods after the portions of Clauses 7 and 18 which the Court referred to, they were taken out of context. The entire sentence of Clause 7, quoted only in part by the Court, reads:

> "Demurrage, if incurred, to be paid by Charterers at the rate of Seven-Hundred Dollars ($700) per day or pro rata for any part of a day."

The function of Clause 7 is not to allocate liability for demurrage, but to agree upon the rate at which demurrage would be paid. The same was true of the original printed language of the GENCON form, which also specified the number of laydays before demurrage would begin to accrue. See Ex. 75, Clause 7.[7] Clause 7 as modified in the NICTRIC charter party also recognizes, as do Clauses 8, 16, 17, 18 and others, that the voyage charterer—as between it and Amtro—was to control and to be responsible for arrangements for loading and discharge of the vessel.

Clause 8 of the charter party then goes on to define the liabilities of the parties for demurrage, giving Owners a lien on the cargo and stating that Charterers are to remain responsible, notwithstanding the lien, for demurrage incurred at the *loading* port; but Charterers are to be responsible for unpaid freight and demurrage at the *unloading* port

> "only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo."

Clause 18, among many additions in the NICTRIC charter party to the original printed GENCON form, modifies and expands upon Clause 7, not Clause 8. It specifies the number of days within which cargo is to be loaded, stowed and discharged, how those days are to

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[7] Clause 7 in the original printed GENCON form (Ex. 76), before any deletion or additions, read:

"Ten running days on demurrage at the rate of $ per day or pro rata for any part of a day, payable day by day, to be allowed merchants altogether at ports of loading and discharging."

be calculated, and refers to Clause 7 for the rate at which demurrage is to be paid.

Thus, Clause 18, like Clause 7, contains provisions relating to demurrage, wherever incurred, and does not modify the allocation of liability for demurrage set forth in Clause 8. The conflict with Clause 8 found by the Court in Clauses 7 and 18 on liability for demurrage (R. 138-140) plainly does not exist. The Court found conflict with Clause 8 by reading only parts of sentences in Clauses 7 and 18, overlooking the remainder of each sentence and the function of both clauses in the charter as a whole. The Court plainly erred in reading Clauses 7 and 18 as containing "specific language under which Schnitzer, without qualification, agrees to pay the [unloading] demurrage" (R. 140, lines 2-4).

The only two cases we have found on the cesser clause in the GENCON form of charter party are *"Z" Steamship Co., Ltd., v. Amtorg, New York,* 61 Lloyd's List L. R. 97, (K. B. Div. 1938), and *The Luossa,* 1936 A.M.C. 213 (Arb. 1935). Both cases illustrate the function of the cesser clause in defining liability of the parties for demurrage and its harmony with other clauses dealing with the rate at which demurrage is to be paid and the method of its calculation. Like Amtro here, the vessel owner in *The Luossa* argued that an addition to the original printed form of the GENCON charter modified the cesser clause. As the arbitrators stated in that case (1936 A.M.C. at 216-217), the parties would have stricken out Clause 8, if they had not intended it to be given effect along with other clauses in the charter party, including those added to the original printed form.

No Evidence Schnitzer Author of Charter Party

The Court, finding conflict in Clauses 7 and 18 with Clause 8, resolved it against Schnitzer, as author of the charter party (R. 140). There is no evidence that Schnitzer authored the language of the changes and additions to the original printed GENCON form. The evidence is that Schnitzer turned over to Seacharter Company, a charter broker, a charter previously used for a scrap cargo carried on the vessel KEHREA, as a sample for discussion (Tr. 177). The provisions of the KEHREA charter party pertaining to demurrage, including the deletions from and additions to the original printed language in Clauses 7 and 8, and the addition of Clause 18, were substantially identical to the charter party finally agreed upon for the NICTRIC, except that in the NICTRIC charter Sundays and holidays were to count, if used (Ex.. 76, 2; Tr. 200, 36, 42).

All Schnitzer did was offer as a sample for discussion with Amtro a charter party which had been used in a prior scrap cargo. There is no evidence as to which of the parties to the KEHREA charter, if either of them, made the changes from the original printed GENCON form, and no evidence that Schnitzer or Amtro drafted the modifications of the KEHREA charter which appear in the NICTRIC voyage charter.

No Evidence Schnitzer Agreed With Court's Construction of Voyage Charter

The Court, attempting to buttress its interpretation that Clause 8 had been, in effect, modified out of the charter party, found that Schnitzer and its counsel took

the position until December 7, 1961, "that in fact there was no lien on the cargo," and that until that date Schnitzer interpreted the contract 'in line with Amtro's and this Court's conclusions" (R. 141, lines 5-14, 20-22). This finding is without any evidentiary support and clearly erroneous.

The record shows that all parties assumed the existence of the vessel's lien on the cargo until after this case was filed, and that Amtro repeatedly notified Schnitzer of its intent to exercise the lien.

The pleadings of Owners and Amtro alleged Clause 8 of the voyage charter party and that Owners and Amtro were unable to exercise the lien on cargo because of port congestion. Owners' original libel filed on December 14, 1961, while the cargo was being discharged from the NICTRIC, pleaded Clause 8 of the voyage charter party verbatim and alleged in Article XV (R. 4):

> "Because of the congested port conditions at the Port of Tokyo, Owners have been unable to obtain payment of the demurrage monies earned on the said voyage by exercising a lien on cargo, although they have made diligent efforts to effect the same."

The amended libel, filed almost a year later on November 7, 1962, contained the same allegations (R. 39). Amtro's cross-libel against Schnitzer filed on January 31, 1962, contained identical allegations (R. 18). Owners continued to assert the existence of a lien under Clause 8 and their inability to exercise it, as satisfaction of the condition upon Schnitzer's liability, as late as the filing of the Pretrial Order on July 20, 1964 (R. 108, Para. 8

and 9). By this time, however, Amtro was claiming that Clause 8 of the voyage charter party was ineffective and that Amtro had no obligation "to endeavor first to obtain payment of freight and demurrage by exercising the lien on the cargo" (R. 109, Para. 3).

The first demand by Amtro's counsel upon Schnitzer for payment of the demurrage accruing in Japan was Mr. Fletcher's telegram of November 10, 1961, to Leonard Schnitzer (Ex. 101, Tr. 103), which read:

> "WE REPRESENT AMTRO CORP. RE SS NICTRIC. AMTRO NOW FORCED MAKE ARRANGEMENTS EXERCISE LIEN ON CARGO UNDER CLAUSE 8 CHARTER UNLESS YOU ADEQUATELY SECURE PAYMENT DEMURRAGE. AS YOU KNOW EXERCISE LIEN IN JAPAN OR TAKING CARGO ELSEWHERE WILL CAUSE GREAT EXPENSE AND ADDITIONAL DELAY OF VESSEL WHICH WILL GO TO REDUCE PROCEEDS OF LIEN EXERCISE AND ADD TO YOUR LIABILITY FOR DEFICIENCY UNDER CHARTER. TO AVOID THIS AMTRO PREPARED TO PERMIT DISCHARGE OF CARGO TO RECEIVERS WITHOUT EXERCISING LIEN ON CONDITION YOU AGREE FIRST GUARANTEE FULL PAYMENT FREIGHT AND DEMURRAGE DUE UNDER CHARTER WITHOUT AMTRO EXERCISING LIEN."

Mr. Fletcher's letter of November 14 to Schnitzer (Ex. 115) offered to waive Amtro's lien against the cargo under Clause 8, if Schnitzer would agree to be responsible for the demurrage and unpaid freight.

Attached to the letter was Mr. Fletcher's draft of a

proposed agreement relating to the NICTRIC voyage charter, which he requested Schnitzer to execute. Fletcher's draft of the first paragraph read (Ex. 115):

> "1. Sub-Charterer agrees to remain responsible for the entire demurrage and unpaid freight and any other sums due or to become due under said sub-charter *without Time-Charterer first exercising a lien on the cargo as required by Section 8 of said charter.*" [emphasis supplied]

Fletcher plainly realized, contrary to the Court's findings, that exercise of the lien on the cargo by Amtro was required by Clause 8 of the charter party, as a condition to the existence of Schnitzer's liability for demurrage and unpaid freight.

Fletcher by his own testimony threatened exercise of the lien orally on November 13, 1961 (Tr. 105). Mr. Fletcher testified to a telephone argument with Mr. Krause, Schnitzer's counsel, on November 17, 1961, in which Fletcher said Amtro had a lien on the cargo for demurrage and unpaid freight and would exercise it unless Schnitzer gave security for the sums (Tr. 107). According to Fletcher, Mr. Krause at this time took the position that the demurrage was not due and the lien not exercisable until completion of discharge (Tr. 107). Fletcher at the same time was arranging with Owners for exercise of the lien on the cargo (Tr. 110). In further communications with Schnitzer's counsel, Fletcher took the position on behalf of Amtro that it would exercise the lien against the cargo under Clause 8 unless Schnitzer acted to post security for the unloading demurrage (Ex. 67, 68, 69, 118, 120; Tr. 224).

Acting pursuant to arrangements made by Amtro's counsel with the owners of the vessel, Dodwell & Co. (Owners' Tokyo agent) on November 27, 1961, wrote to all receivers of the NICTRIC cargo, stating that exercise of the lien on cargo had been ordered unless the consignees paid or gave security for their proportionate share of the accruing demurrage (Ex. 113; Ex. 44E, pp. 16-17; Ex. 44G, p. 159).

In short, Amtro's position throughout its attempts to force Schnitzer to pay the unloading demurrage was that it had a lien on the cargo for the demurrage and unpaid freight and that it would be exercised, unless Schnitzer paid or gave security for these sums and waived the cesser clause requiring Amtro to exercise the lien. Schnitzer never took the position that Amtro had no lien on the cargo. When Mr. Krause on December 7, 1961, notified Fletcher that Schnitzer denied responsibility for the Japanese demurrage, Fletcher told the owners to proceed with exercise of the lien (Tr. 114). On the witness stand, Mr. Fletcher admitted that Amtro had a lien on the cargo (Tr. 124).

Thus, the only change of position in this litigation is that of Amtro, which now claims that there was no lien on the cargo for demurrage and that Clause 8 of the charter party was not in effect. Amtro's present position is an afterthought, occurring when the insufficiency of evidence on inability to exercise the lien became apparent.

Effect of Sale Contracts on Liability for Demurrage

In support of its conclusion that the lien of the cesser clause was not intended to be operative, the Court also found that all of Schnitzer's contracts for sale of cargo, with one exception, provided that liability for demurrage at the unloading port, as between Schnitzer and its buyers, was upon Schnitzer (R. 142, lines 2-4). The Court's implication is that Schnitzer is ultimately liable, in any event, for the unloading demurrage.

The Court's construction of the sale contracts is erroneous. With the exception of one buyer (Mitsui), the contracts did not provide that demurrage was for Schnitzer's account. The Court's suggestion that Schnitzer would be ultimately liable to the buyers for demurrage overlooks not only the terms of the contracts themselves, but also other provisions governing the relations between Schnitzer and its customers, principally the fact that the charter party was incorporated in the bills of lading.

In only three of the eight sale contracts was the subject of demurrage at the unloading port expressly mentioned. Okaya expressly agreed to pay the demurrage (Ex. 112; R. 142). The two Mitsui contracts guaranteed customary quick dispatch ("C.Q.D."), with buyer paying stevedore charges, but provided that demurrage was for "seller's account" (Exs. 18, 19). In seven of the eight sale contracts (Exs. 16, 18, 19, 20, 109, 111, 112), including the two with Mitsui, the buyer expressly agreed to arrange and be responsible for discharge of the cargo from the vessel, or bought "FO" (free out), meaning

that the buyer, not the shipper, is responsible for unloading the vessel. See *St. Ioannis Shipping Corp.* v. *Zidell Explorations, Inc.*, 222 F. Supp. 299, 305 (D. Or. 1963), affm'd. 336 F.2d 194. The sales under all of the contracts were "C & F" or "CIF," which places responsibility for discharge of the vessel on the buyer. See 2 WILLISTON ON SALES (Rev. ed.) Sec. 280n and 280o. Only in Ex. 110, the Kuwamasa contract, is there any ambiguity in responsibility for discharge. The sale terms of that contract are "CIF (Berth Terms)." Berth terms contemplate the buyer receiving delivery upon the dock, rather than from the vessel, whereas CIF specifies buyer's responsibility for discharge from the vessel. Moreover, four of the sale contracts (Exs. 16, 109, 111, 112) specifically stated "charter party bills of lading acceptable," obviously contemplating incorporation of the charter party terms in the bills of lading.

All bills of lading on the NICTRIC cargo did, in fact, incorporate the terms of the charter party. See Exs. 4-13. This obviously included the lien provisions of the cesser clause and the stipulated periods for loading and discharge in Clauses 18 and 19, after which demurrage would accrue. The trial court completely overlooked these facts in suggesting that Schnitzer, rather than the receivers of the cargo, was ultimately liable for the unloading demurrage.

Where cargo is accepted on discharge under bills of lading incorporating a charter party with a cesser clause or stipulating an agreed time for or rate of discharge, the ultimate liability for demurrage at the discharge port is upon the receivers of the cargo, and not

the vessel or the charterer-shipper. *Yone Suzuki v. Central Argentine Railway,* 27 F.2d 795, 800, 805 (C.C.A. 2, 1928), cert. den. 278 U.S. 652; *The Hans Maersk,* 266 Fed. 806 (C.C.A. 2, 1920); *The Hartismere,* 18 F. Supp. 767, 1937 A.M.C. 594 (D. Md. 1937); Poor, Charter Parties and Ocean Bills of Lading (4th ed. 1954) Sec. 27; Tiberg, The Claim For Demurrage (1962) Ch. II, p. 15 et seq. One who accepts cargo under a bill of lading incorporating such provisions impliedly so agrees. See *Yone Suzuki* v. *Central Argentine Railway,* suppra, 27 F.2d at 800-801.

Thus, all receivers of the cargo in this case took delivery under bills of lading incorporating a charter party with a cesser clause and a specified time for discharge, and thereby impliedly agreed to assume the liability for demurrage at the unloading port which was created by shipment and delivery on these terms. Receipt of cargo under bills of lading incorporating charter party terms rendering receivers liable for demurrage and unpaid freight prevails over any conflicting terms in a sale contract. *Taylor v. Fall River Iron Works,* 124 F. 826 (S.D.N.Y. 1903).

The same would be true under Japanese law, which holds that each consignee was responsible for payment of all demurrage accrued on the cargo covered by the bill of lading that was negotiated to it. See testimony of Prof. Tanikawa, Ex. 44J, pp. 231-233.

The ultimate liability of the cargo buyers for unloading demurrage was recognized by Amtro's counsel, Mr. Fletcher, who wrote to them on December 21, 1962, a year after this case was filed, to demand payment of the demurrage (Ex. 106, 107, 107-A).

Conclusion

The trial court plainly erred in construing the lien provisions of Clause 8 of the charter party to have been modified out of existence. There was no conflict between the allocation of liability for demurrage in Clause 8 and any other clause of the charter party. All parties took the position, until after this case was begun, that Clause 8 and its lien provisions were in effect. By accepting the cargo under bills of lading incorporating the charter party into them, the receivers of the cargo assumed liability for the unloading demurrage, as specified in the cesser clause. Schnitzer's sale contracts with its buyers and the control of discharge by the buyers are consistent with, if not additional grounds for the ultimate liability of the buyers for the unloading demurrage.

II

The Court erred in holding that the condition of Amtro's inability to exercise its lien on the cargo should not be enforced against Amtro, in admitting and relying on hearsay relating to Amtro's alleged inability to exercise the lien, and in holding that the Japanese statutory lien could not be exercised.

(Specifications of Error Nos. 5-18)

As an alternative basis for its decree against Schnitzer for the unpaid freight and demurrage, the Court held that the condition in Clause 8 of the charter party of Amtro's inability to exercise the lien on cargo should not be enforced against Amtro (R. 144). The Court also found that a lien under Japanese law on cargo in the

hands of consignees within a two-week period after delivery could not be exercised because delivery had been to third-party purchasers from the consignees (R. 142-143, 144).

The District Court did not expressly find or conclude that Amtro, in the language of Clause 8 of the charter party, was "unable to obtain payment [of the demurrage and unpaid freight] by exercising the lien on the cargo." Instead, the Court apparently placed the burden of proof on Schnitzer and found against arguments and evidence of Schnitzer showing how the lien could have been exercised (R. 142-144). It also held that "Amtro was not in a position to effectively assert its lien on account of the representations of Schnitzer that the demurrage and unpaid freight would be paid" (R. 144). The Court therefore concluded:

> "Even if Clause 8 remained in full force and effect, not modified by the typewritten language, the provision with reference to the exercise of the lien being the sole remedy, it should not be enforced on the record before me." (R. 144)

Thus, the Court seems to be invoking some sort of estoppel or equitable bar to Schnitzer insisting on proof of the condition to its liability provided in Clause 8, rather than finding that Amtro's inability to exercise the lien was proved.

No Substantial Evidence that Amtro Unable to Exercise Lien

To the extent that the Court's opinion may be read as a finding and conclusion that Amtro was unable to exercise its lien upon the cargo for unpaid freight and

demurrage, there is no substantial evidence in the record to support it. Amtro clearly did not exercise the lien. Clause 8 requires Amtro to establish that it was "unable" to do so, before Schnitzer is liable. This calls, at the very least, for a showing of unsuccessful attempts to exercise the lien, or proof of conditions demonstrating that attempts to exercise the lien in any fashion would have been futile gestures..

Under Clause 8 of the charter party, the burden is upon Amtro to show that the lien on cargo could not be exercised, as a condition of Schnitzer's liability for the unpaid freight and demurrage. It was expressly so held by the arbitrators under an identical cesser clause in *The Luossa,* 1936 A.M.C. 213 (1935). See also *The Arizpa,* 63 F.2d 42, 43 (C.C.A. 4, 1933); Tiberg, THE CLAIM FOR DEMURRAGE (1962), p. 55.

All evidence relating to failure or alleged inability to exercise the lien on cargo was in the form of depositions or other documentary materials. In this situation, an appellate court lacks no advantage of the trial court in evaluating the evidence, and properly accords less presumptive validity to findings of the trial court based on such evidence. See, for example, the decisions of this Court in *The Ernest H. Meyer,* 84 F.2d 496, 500-501 (1936), cert. den 299 U.S. 600; *Johnson v. Griffiths,* 150 F.2d 224 (1945); *Murphey* v. *U.S.,* 179 F.2d 743, 744-745 (1950); *American Eagle Fire Insurance Co. v. Eagle Star Insurance Co.,* 216 F.2d 176, 179 (1954). Other Courts of Appeals follow this practice when the evidence on an issue is mostly in written form. *Iravani Mottaghi* v. *Barkey Importing Co..,* 244 F.2d 238, 248

(C.A. 2, 1957), cert. den. 354 U.S. 939; *Dollar v. Land,* 184 F.2d 245, 248-249 (C.A. D.C., 1950), cert. den. 340 U.S. 884; *Spanos* v. *The Lily,* 261 F.2d 214-215 (C.A. 4, 1958). The three decisions last cited make it clear that the lesser presumption given findings based on written evidence is but a common-sense application of the "clearly erroneous" rule of *McAllister v. U.S.,* 348 U.S. 19 (1954), which requires the appellate court to examine the entire evidence on a challenged finding.

The evidence demonstrates that exercise of the lien against cargo was considered by Amtro and Owners only between November 24, 1961, and December 10, 1961, when a decision was made to bring suit against Schnitzer in Oregon for the demurrage and unpaid freight. After December 10, efforts of the Japanese agents and attorneys were directed toward collecting "proof" that the exercise of the lien was impossible because of port congestion. The vessel was discharging cargo from December 3, 1961, until December 31, 1961 (R. 105), and this suit was filed on December 14, 1961 (R. 1).

In this entire period of November 24, 1961, to December 31, 1961, the only external efforts to exercise the lien were letters of Dodwell & Co. to Japanese consignees on November 27, mildly and unsuccessfully requesting payment of the demurrage (Ex. 113; Dep. Ex. F-1; Ex. 44 E, p. 15; Ex. 44 G., p. 159), with no follow-up whatsoever, and Dodwell's unsuccessful request to eight stevedore firms on December 12, 1961, for lighters in which to discharge the cargo for lien purposes (Dep. Ex. B-3 - B-8; Ex. 44E, pp. 22, 52-52-A).

Saishoji did nothing other than contact eight stevedores on December 12, 1961. He testified on cross-examination:

"Q. . . . The only things you did, was to contact the stevedore companies?"

A. Yes.

. . . . .

Q. You personally did nothing else.

A. No, that was the job for other departments.

. . . . .

Q. Your only contact with the whole demurrage case, and the exercise of the lien, was to contact stevedores?

A. Yes." (Ex. 44 E, pp. 133-134)

As argued below, the December 12 contact with stevedores was part of the process of gathering evidence of inability to exercise the lien, after a decision had been made to sue Schnitzer in the United States.

Main did nothing other than his letter to the consignees (Ex. 113) on November 27, 1961. He testified on cross-examination:

"Q. . . . Other than this letter, you didn't do anything to lien the cargo on the 'NICTRIC' except for conferring with your assistants, or directing them or whatever, is that right?

A. Yes."

(Ex. 44 G., p. 166)

Mr. Stewart of Amtro did nothing toward exercise of the lien except to discuss it with Morgan (Tr. 79-81). Morgan claimed to have inquired on December 8, 1961, of a stevedore representative about lighters, but admitted on cross-examination that he could not remember the

name of the company (Ex. 44F, pp. 77, 144). He also admitted that he did nothing after December 8, 1961, to exercise the lien (Ex. 44F, p. 110).

A chronological summary of the correspondence and cables between Amtro, Owners and their Japanese representatives will demonstrate the *pro forma* nature of any desire or attempt to exercise the lien, particularly after the decision was made to bring suit against Schnitzer. The first evidence of any arrangements to exercise the lien is the testimony of Amtro's attorney, Mr. Fletcher, that between November 20 and November 25, 1961, he told Owners' New York attorneys to arrange for it (Tr. 110), to which they agreed (Tr. 111). On November 24, 1961, Dodwell & Co., Owners' agents in Tokyo, received advice of this from Owners, and was instructed to make demand, in conjunction with Owners' Tokyo counsel (the McIvor firm), on the consignees for payment of accrued demurrage and unpaid freight (Dep. Ex. B-17; Ex. 44E, pp. 19, 132). As noted above, letters were sent to the consignees on November 27 (Ex. 113, Dep. Ex. F-1; Ex. 44E, p. 15; Ex. 44G, p. 159). This produced no results except the denial of liability by two of the consignees on November 29 (Dep. Exs. F-2, F-3; Ex. 44E, pp. 17-18; Ex. 44G, p. 159).

On November 29, Owners cabled Dodwell instructing immediate exercise of the lien (Dep. Ex. B-24). Dodwell meanwhile had contacted the McIvor firm about this, and so reported to the Owners (Dep. Ex. B-16; Ex. 44E, pp. 20, 123; Dep. Ex. B-20, B-25; Ex. 44G, p. 177-1). Captain Cassimatis, Master of the NICTRIC (then lying in Tokyo harbor), in late No-

vember cabled Owners that he agreed with exercise of the lien, and stated "do not anticipate any difficulties regarding demurrage though settlement takes up to 3 months" (Dep. Ex. B-21). Discharge of the vessel commenced on December 3, 1961 (R. 105).

On December 7, 1961, Mr. Fletcher, Amtro's counsel, was advised by Schnitzer that it would not be responsible for the demurrage, which Fletcher immediately reported to Owners' New York counsel (Tr. 113-114). It was thus clear at this time, if it had not been earlier, that exercise of the lien was going to be necessary, since both Schnitzer and the consignees disclaimed responsibility.

On December 9, 1961, however, Dodwell sent a cable to Owners containing the following report:

> ". . . VIEW UNAVAILABILITY LIGHTERS STORAGE SPACE ONLY WAY EXERCISE LIEN IS BY CEASING DISCHARGE AND HOLDING IN SHIP WHICH ACTION OWING CURRENT CONGESTION EMERGENCY MEASURES WILL RESULT IN PORT AUTHORITIES ORDERING NICTRIC OUT OF BERTH NECESSITATING AWAITING TURN LATER FOR REALLOCATION BERTH INCURRING FURTHER DELAY THEREFORE *IMMEDIATE LIEN ACTION UNADVISABLE BEST WAIT UNTIL ABOUT* 1500 *TONS CARGO REMAINING IF LIEN STILL NECESSARY AT THAT TIME.* ENDEAVORING NEGOTIATE WITH CHARTERERS REPRESENTATIVES MEANWHILE SCHNITZER LEFT JAPAN RETURNED USA. CONSULTED McIVORS WHO ADVISE VIEW CHARTER COMPLICATIONS LITIGATION JAPAN

SHOULD BE AVOIDED IF POSSIBLE CONSEQUENTLY RECOMMEND YOU CONTINUE EFFORTS GUARANTEE FROM VOYAGE CHARTERERS *MEANWHILE WE WILL EMPHASIZE TO RECEIVERS INTENDED LIEN* AND POSSIBLY THEY WILL PRESSURIZE SCHNITZER GIVE SECURITY." (Dep. Ex. F 4, emphasis supplied; Ex. 44E 20-22; Ex. 44G 171-172)

There is no evidence that Dodwell after sending this cable told receivers of the intended exercise of the lien or, in fact, had any further contact with the receivers. Owners replied to this report by cable to Dodwell on December 10, 1961, to the effect that its New York attorneys had decided to bring suit in Oregon and garnish Schnitzer for demurrage monies, and instructed Dodwell to have McIvor submit proof of impossibility of lien exercise to the Owners' New York attorneys (Dep. Ex. B-23).

Dodwell's cable of December 9 (Dep. Ex. F-4, quoted above) is not, of course, proof in this case of the facts it reported to Owners. As of this cable, the only evidence of any activity whatever to exercise the lien was the letter of Dodwell to the consignees on November 27, 1961 (Ex. 113; Dep. Ex. F-1). There is no testimony that anyone ever contacted the harbor authorities about holding the cargo on board or using lighters for possession of the cargo during exercise of the lien. It was Dodwell's recommendation that exercise be delayed until 1500 tons remained on board.

The only thing done after this exchange of cables on December 9 and December 10 (Exs. F-4, B-23) was Mr. Saishoji's contact for Dodwell & Co. on December

12 of eight stevedore companies in the Tokyo area (Ex. 44E, p. 22, 52-52A; Dep. Ex. B-3 - B-8), six of whom dutifully signed the form at the foot of Dodwell's letter acknowledging that they could not furnish lighters for exercise of the lien (Dep. Ex. B-3 - B-8).

Mr. Fletcher testified (Tr. 115) that he was told on December 11 by Owners' New York attorneys that McIvor reported that exercise of the lien against the cargo was impossible. No witness or document from the McIvor firm was introduced to support this double hearsay. In fact, the McIvor firm seems not to have been given all the facts, and had advised only that it might be safer to sue Schnitzer than to exercise the lien. In a letter to Dodwell dated December 13, 1961, the McIvor firm stated:

> ". . . We agree that Owners are still advised to obtain satisfaction from charterers since *unless the bills of lading are properly clausedi* they would have no right to lien the cargo for the demurrage. In addition, the existence of the voyage charter would complicate any legal action in Japan thereby making it difficult to bear pressure on the consignees.
>
> "For your records we set forth below a copy of cable received yesterday from Mainbrace:
>
> > " 'NICTRIC PLEASE OBTAIN DETAIL PROOF OF IMPOSSIBLITY LIENING CARGO ACCORDANCE WILSON REPORT AND FORWARD TO US ALSO PLEASE ADVISE APPROXIMATE DATE COMPLETION DISCHARGE'
>
> and we note that you are proceedming to obtain and we note that you are proceeding to obtain the necessary proof." (Dep. Ex. B-18, emphasis supplied; see also Dep. Ex. F-4, quoted supra)

In fact, the bills of lading were "properly clausedd," incorporating the charter party cesser clause. Mr. Main of Dodwell & Co. admitted (Ex. 44G, p. 177-2) that the McIvor firm never advised Dodwell & Co. that exercise of the lien was impossible, legally or otherwise.

The libel in this case was filed on the following day, December 14, 1961 (R. 1). There is no evidence of any further efforts whatever to exercise the lien, and in fact there were no efforts after Mr. Saishoji's contact with eight stevedoring firms on December 12, requesting the use of lighters.

When discharge was nearing completion, Dodwell & Co. cabled Owners on December 26 as follows:

> "NICTRIC GUIDANCE RECEIVERS ENDEAVOURING COMPLETE BY THIRTY FIRST AND ALTHOUGH DOUBTFUL VIEW ONLY ABOUT 1200 TONS NOW REMAINING FEEL IF LIEN NECESSARY MUST ACT IMMEDIATELY. McIVORS ADVISED. PLEASE INSTRUCT." (Dep. Ex. B-19; Ex. 44G, p. 177-2)

To this, Owners replied on December 28 by cable to Dodwell:

> "NICTRIC YOURTEL 26TH UNDERSTAND FROM McIVOR THAT LIEN IMPOSSIBLE THEREFORE CLUB PROCEEDING AGAINST VOYAGE CHARTERERS PORTLAND *NEVERTHELESS ENDEAVOUR EXERCISE LIEN VIEW KEEPING VOYAGE CHARTERERS RESPONSIBLE UNDER CLAUSE 8 VOYAGE CHARTER*. . . ." (Dep. Ex B-2, emphasis supplied; Ex. 44E, p. 42, 7x. 44G, p. 177-2)

These two cables confirm that efforts concerning ex-

ercise of the lien after the libel was filed on December 14, 1961, were simply motions to "endeavour exercise lien view keeping voyage charterers responsible under Clause 8 voyage charter," in the words of the December 28 cable.

The total cargo carried by the NICTRIC was 8,991.14 long tons (Exs. 4-13). On the basis of prices paid by the Japanese buyers for the cargo delivered to Tokyo, its value in Tokyo harbor was about $500,000 (see Tr. 196; Exs. 16, 18-20, 109-112), or more than $50 per long ton. Assuming a steady rate of discharge from beginning to end (December 3-December 31, 1961), half the cargo (value at least $225,000) remained on board on December 18, ten days after Schnitzer disclamed liability. The 1500-ton point (value at least $75,000) was not reached until about December 24. As late as December 26, when Dodwell cabled that 1200 tons remained on board, the vessel could have ceased discharging and kept cargo in its possession worth at least $60,000.

The question thus boils down to this: is the evidence offered of alleged inability of eight stevedore firms to furnish lighters to exercise the lien sufficient to permit a finding that Amtro was unable to exercise its lien on the cargo under the circumstances shown by the record, thus fulfilling its obligations under Clause 8 of the charter party? There are 20 large stevedoring firms and some 50 smaller ones in the Tokyo harbor area (Ex. 44H, p. 187-1). No attempt was made to secure lighters from any other firms or from any firm at any time other than December 12 Ex. 44E, p. 22, 126; Ex. 44G, p. 163). No method for exercising the lien was considered or at-

tempted by Amtro or Owners other than discharge into lighters (Ex. 44E, p. 136). No attempt was made to exercise the lien by stopping discharge and holding the cargo on board the vessel (Ex. 44E, p. 59; Ex. 44G, pp. 160, 168), or to inquire about partial discharge for lien purposes at a special seven-day berth (Ex. 44G, p. 168-169; Ex. 44H, p. 187-2, et seq.), or to explore any other means of exercising the lien. The Dodwell employees admitted that the contact of the eight stevedore firms on December 12 was the only thing that anyone did toward exercise of the lien (Ex. 44E, pp. 126-127; Ex. 44G, p. 163).

Other than citing the contact of eight stevedore firms on December 12, 1961, by Dodwell & Co., the Court's opinion, like Amtro's argument, is devoted to exposition of why any other efforts to exercise the lien would have proved unsuccessful. No attempt was made to cease discharging or to hold the cargo on board the vessel (Ex. 44 E, p. 59). The Court found that the vessel, had it done so, "risked . . . the probability of being moved by the harbor authorities and sent to anchor outside to wait another turn at discharge," behind some 50 to 100 other waiting ships. See also R. 143.

There is no substantial evidence to support this finding (see Specification of Error No. 6). No Japanese harbor authority was called as a witness, and no law, regulation or custom of the port was proved. Saishoji and Main speculated that this might occur (Ex. 44E, pp. 24-25; Ex. 44G, 160, 177-3, 177-4), but this was clearly hearsay and opinion based on matters outside the record (see Specifications of Error Nos. 12(b) and (c),

16(a), (d) and (e)). They made no inquiry to the harbor authorities about stopping discharge on the NICTRIC (Ex. 44E, pp. 62, 64, Ex. 44G, p. 162).

Saishoji admitted that he had no personal knowledge concerning exercise of the lien on the NICTRIC, except his contact with eight stevedore firms on December 12: "I was told by Mr. Main that the lien was impossible" (Ex. 44 E., p. 126, and see pp. 129, 133-134).

Main's sole actions relative to the NICTRIC lien exercise were to direct his assistants at Dodwell & Co., and his testimony obviously must have come from what they told him:

> "Q. [by Mr. Lewis] . . . What did you personally have to do with the attempt to lien the 'NICTRIC' cargo?
>
> . . . . .
>
> A. My personal actions would be to direct the Japanese staff concerned to take the action which I considered necessary to meet the occasion.
>
> Q. Certainly, but your action then would be with your staff, is that right?
>
> A. Yes.
>
> Q. But as far as attempts to lien the 'NICTRIC' cargo, did you personally do anything other than to confer with your assistants?
>
> A. No, just conferred with my assistants." (Ex. 44 G., p. 162).

See also Ex. 44 G., pp. 163, 172.

That exercise of the lien may have delayed the vessel further is no excuse for Amtro's failure to exercise it. The result would only have been additional demurrage charges by the vessel to collect out of the exercise of the

lien on the cargo. As shown above, there was cargo on board the NICTRIC worth 15 times as much as the demurrage awarded here for a period of almost three months. If exercise of the lien did not produce sufficient sums to pay all demurrage and expenses of exercise, the lien was to that extent not commensurate with the liability it was intended to secure, and Amtro could have recovered against Schnitzer any deficiency remaining after exercise of the lien. *Crossman* v. *Burrill,* 179 U.S. 100 (1900). Amtro's counsel, Mr. Fletcher, made the same point in his original demand of November 10, 1961, on Schnitzer (Ex. 101):

> ". . . AS YOU KNOW EXERCISE LIEN IN JAPAN OR TAKING CARGO ELSEWHERE WILL CAUSE GREAT EXPENSE AND ADDITIONAL DELAY OF VESSEL WHICH WILL GO TO REDUCE PROCEEDS OF LIEN EXERCISE AND ADD TO YOUR LIABILITY FOR DEFICIENCY UNDER CHARTER . . ."

The Court also rejected (R. 143) Schnitzer's uncontradicted evidence that discharge for purposes of exercising the lien could have occurred without lighters by moving the vessel to Harumi wharf, a special scrap-discharge berth where a vessel could remain only seven days. It found that this facility could not have been used because the entire cargo could not have been discharged within seven days (R. 143). This finding and the evidence cited by the Court to support it are the subjects of Specification of Error No. 7.

Mr. Koizumi of Pacific Marine Corporation, the Japanese agent of Amtro and Schnitzer for this voyage, testified that these facilities were available and could have

been used for this purpose (Ex 4H, pp. 187-1, et seq.). He testified that 4,500 tons could have been discharged there in seven days (Ex. 44 H., p. 187-17). At $50 per ton, that amount of cargo would have been worth $225,-000, far more than the amounts in issue. Bonded space for storage until resale was also available there (Ex. 44 H., p. 187-3, 187-4). Also, lighters could discharge at that wharf (Ex. 44 H., p. 187-5). Although Dodwell advised Owners on December 9 to wait until 1500 tons remained before exercising the lien (Dep. Ex. F-4), neither Dodwell nor anyone else made any effort to arrange or schedule discharge at Harumi wharf when the cargo was discharged to that point. While all the cargo could not have been discharged in seven days at Harumi, there is uncontradicted evidence that a sufficient part of it to exercise the lien could have been discharged there within that time, and that there was absolutely no inquiry or attempt to arrange this by Amtro or Owners or their agents (Ex. 44 G., pp. 168-169). Dodwell considered exercise of the lien only by discharge into lighters (Ex. 44 E., p. 136).

The Court's holding that exercise of the lien could not have occurred through discharge at Harumi wharf was based upon the following finding (R. 143):

> "Schnitzer's agent tried to put the vessel in at this particular wharf, but could not do so on account of the nature of the vessel's scrap."

This finding is unsupported by substantial evidence (Specification of Error No. 7), since the only possible basis for it is hearsay and self-serving material found in Dep. Ex. B-11, a letter dated January 9, 1962, from

F. A. L. Morgan, Amtro's Far-Eastern representative, to Amtro. The objection to its admissibility was asserted in the trial court (R. 127-128) and overruled (R. 186). It is the subject of Specification of Error No. 14 on this appeal.

Ex. B-11 was produced in Morgan's deposition (Ex. 44F, pp. 89 et seq.) by Owners' counsel in cross-examination concerning efforts to locate a cargo for the NICTRIC's return voyage, not in relation to the lien issue. In the course of a long report to Amtro, Morgan wrote:

> "During my visit to Tokyo in the period 21st October to 8th November, Schnitzer Steel Products' Tokyo representative, Mr. Morgulis, had been endeavoring to arrange for the Nictric to discharge out of turn at a special quick discharge berth, but subsequently gave up the idea because of the Nictric's varied types of scrap cargo which would not admit of completion within seven days." (Ex. B-11, p. 1)

Morgan failed to give any such testimony in his deposition, and the letter was written over a month after this case was filed. The letter was from one Amtro official to another. Morgan does not state the source of his information, nor whether the quoted statement is his personal knowledge. The quoted portion of Ex. B-11, relied upon by the Court, is plainly hearsay and inadmissible against Schnitzer. The Court's overruling of Schnitzer's objection to it (R. 186) and reliance on it is plainly prejudicial error.

The Court also found that no bonded space in

all of Tokyo harbor was available for retaining possession of the cargo ashore while the lien was exercised (R. 143). The lack of evidence to support this finding is the subject of Specification of Error No. 9. To the contrary was the testimony of Koizumi that bonded storage space was available at Harumi wharf (Ex. 44H, p. 187-3, 187-4). Since Main lacked personal knowledge, as pointed out earlier, his testimony on unavailability of storage space was hearsay opinion, not based on any inquiry on his part. See Specifications of Error No. 16(c) and (d). The hearsay character of similar testimony by Morgan is plain from Morgan's own testimony, in which he admits that his testimony was an opinion told to him by a stevedoring firm (Ex. 44F, p. 77); Specification of Error No. 13).

The only evidence cited by the Court (R. 143) for this finding is Dep. Ex. F-23, a newsletter published by Pacific Marine Corp of Tokyo dated September 15, 1961. The newsletter was prepared for circulation to the firm's customers for general information, having been compiled from numerous reports, opinions and miscellaneous other sources (Ex. 44H, p. 187-23, et seq.). The report's statements at p. 6 about lack of storage space are quoted by the Court (R. 143). Koizumi was unable to say that this report was sent to Schnitzer (Ex. 44H, p. 187-23).

This report (Ex. F-23) was objected to by Schnitzer as hearsay (R. 127-128), but the objection was overruled by the Court (R. 186). This ruling constitutes the subject of Specification of Error No. 15 on

this appeal. Koizumi admitted that the matters in the report were not necessarily from personal knowledge of those publishing it (Ex. 44H, p. 187-28). Koizumi was not asked as to his personal knowledge on this aspect of the report, except that he testified that storage space was available at Harumi wharf (Ex. 44H, p. 187-3).

Dep. Ex. F-23 was not admissible under the hearsay exception for records kept in the ordinary course of business. It is not an entry in the books of the business. This type of report falls within few, if any of the elements required for admissibility under this hearsay exception, as set forth in McCormick, Evidence (Hornbook Series 1954), pp. 596 et seq. It has no more standing as evidence than a newspaper article. It was, in fact, denominated a "Newsletter" (Dep. Ex. F-23, p. 1). Finally, a report on conditions as of September 15, 1961 has no relevance to conditions bearing on exercise of the lien three months later in December, 1961.

The Court further found (R. 144; Specification of Error No. 8) that Japanese port authorities would not have permitted cargo to be kept in Amtro's possession aboard lighters while the lien was exercised. Here again, the finding could only have been based upon the conjectural and hearsay testimony of Saishoji (Ex. 44E, p. 23, 34A-35) and of Main (Ex. 44G, pp. 173, 177-3, 177-4). See Specifications of Error Nos. 12(a) and (d), 16(c) and (d). No inquiry to harbor officials was made (Ex. 44E, pp. 62, 64), and Saishoji and Main had no personal knowledge, as the challenged testimony indicates.

Saishoji's main reason for his testimony was that the lighter owners would not, in his opinion, accept demurrage rates while the lien was exercised and they preferred to serve the greater needs of their regular customers (Ex. 44E, p. 23, 34A-35). There was no requirement that Amtro pay merely demurrage rates for use of the lighters in exercising the lien. The expenses of exercising the lien, including full charges for use of lighters and storage expense, are recoverable from the proceeds of the lien, or against the charterer to the extent that the proceeds are insufficient to pay expenses and the principal sums due. *The Asiatic Prince* 103 Fed. 676, 677 (E.D. N.Y. 1900), aff'd. 108 Fed. 287, cert. den. 183 U.S. 697; Tiberg, THE CLAIM FOR DEMURRAGE (1962) p 76.

Saishoji testified that lighters could discharge at Harumi wharf on two-weeks' notice (Ex. 44H, p. 187-5). Dodwell in its December 9 cable to Owners (Dep. Ex. F-4 recommended that the lien be exercised on the last 1,500 tons of cargo, but took no steps whatever to apply or inquire about reserving space at Harumi wharf or elsewhere when that point was reached (Ex. 44G, pp. 168-169). Since 1,200 tons remained on December 26 (Dep. Ex. B-19), at least 1,500 tons would have been on board within two week after December 9, and much more on board two weeks after Dodwell was first instructed on November 24, 1961, to arrange for exercise of the lien (Dep. Ex. B-24, Ex 44E, pp. 19, 32).

In short, the Court's findings on matters of Amtro's inability to exercise the lien are unsupported by substantial evidence, and shot through with reliance

on hearsay to which Schnitzer's objections were overruled.

We have found no cases precisely in point as to what constitutes inability to exercise a lien on cargo within the meaning of the cesser clause. Recovery of unpaid freight and demurrage against the charterer was denied in two cases involving the GENCON form cesser clause, for lack of proof by the vessel owner of any effort whatever to exercise the lien. *The Luossa,* 1936 A.M.C. 213 (Arb. 1935); *"Z" Steamship Co.* v. *Amtorg New York,* 61 Lloyd's List L.R. 97 (K. B. Div. 1938). These decisions establish, of course, that the burden is upon the vessel owner to show its inability to exercise the lien against cargo, before it can recover unpaid freight and the unloading demurrage from the charterer.

Similar results are reached under other cesser clauses in which the charterer's liability ceases upon loading of the cargo, except to the extent that the ship's lien is not commensurate with the liability it is intended to cover. Failure of the ship to prove inability to exercise the lien prevents recovery of unloading demurrage from the charterer under this form of cesser clause. *The Arizpa,* 62 F.2d 42 (C.C.A. 4, 1933), cert. den. 290 U.S. 648; *The Eastern Bell,* 1923 A.M.C. 271 (W.D. Wash. 1923).

At the very least, the condition of inability to exercise the lien on cargo stated in Clause 8 of the charter party requires Amtro to prove good-faith efforts to exercise the lien and inability to exercise it because of conditions beyond its control. The evidence here falls

far short of that standard. Amtro and Owners did nothing beyond contacting eight of the numerous stevedoring firms in Tokyo harbor on December 12, when the decision had already been made to sue Schnitzer. Despite the advice of Dodwell & Co., their agents, on December 9, 1961, to delay exercise of the lien until only 1,500 tons of cargo remained on board, nothing whatever was done thereafter to make the necessary arrangements for exercise of the lien when discharging reached that point about December 24.

The record does not even show that a positive threat to exercise the lien was ever communicated by Amtro or Owners to the consignees, after the latter failed to pay or give security for the unpaid freight and demurrage. Dodwell & Co. handled over 100 vessels on demurrage in the congestion period during which the NICTRIC was in Tokyo harbor, and in most cases obtained guarantees of the receivers to pay the demurrage (Ex. 44G, pp. 154-156). To do so undoubtedly required Dodwell to make it known to the consignees that the lien would be exercised unless they met their responsibility. In view of the mild tone of the only letter of Dodwell to the consignees in this case (Ex. 113), it is not surprising that the consignees felt no pressure to assume their liability for the demurrage and unpaid freight. There was no real intent or effort ever manifested by Amtro or Owners to exercise the lien against the cargo.

The uncontradicted evidence indicates that there were in fact no efforts whatever made to exercise the lien after the libel was filed in this case on December

14, 1961, despite the fact that discharge was not completed until December 31, 1961. The allegations in the original and amended libels and the cross-libel that diligent efforts were made to exercise the lien under Clause 8 of the voyage charter party were never substantiated by the evidence.

Failure to Exercise Japanese Statutory Lien

One way to avoid any problem of port congestion was to exercise the lien on cargo in the hands of the Japanese consignees within two weeks after discharge and delivery to them. The Court found that such a lien existed under Japanese law (R. 144), in accordance with testimony given by Japanese legal experts. Ex. 44J, pp. 231, et seq., Dep. Ex. L-4; Ex. 44I, pp. 193, 224. American law recognizes a similar lien. See *Bags of Linseed*, 1 Black 108, 17 L. Ed. 35 (1861).

The Court found, however, that the Japanese statutory lien could not have been exercised because delivery had been to third-party purchasers from the consignees, and not to the consignees (R. 142-143, 144). There is no substantial evidence to support this finding (Specification of Error No. 10). Saishoji's testimony (Ex. 44E, pp. 65-66; Specification of Error No. 12(e)) clearly was hearsay repetition of statements allegedly made to him by the consignees when he inquired of them. Schnitzer's objections to it as such in the trial court (R. 123-125) apparently were not sustained (R. 185).

The cargo discharge survey reports (Exs. 22-27, 29) were offered by Owners in the District Court as show-

ing delivery of the cargo to parties other than the consignees (Tr. 10-12). These reports were certificates of weight and condition of the cargo required by the sale contracts (see Exs. 16, 18-20, 109-112), since payment was to be made on the basis of quantities shown by these reports. These matters were not in issue. The discharge reports certainly were inadmissible to prove passing of title from the consignees or that persons other than the consignees took possession of the cargo upon delivery from the vessel. Schnitzer objected to their admissibility on these grounds, but was overruled by the Court (Tr. 10-12). Error is asserted here (Specification of Error No. 18).

These reports on their face show that their purpose is to measure the character and quantity of cargo discharged, not to reflect ownership or possession of the cargo upon discharge. In designating the consignees and "consumers," the reports could only be reflecting information given by some third party. They do not refer to title documents or state that title or possession had passed to third parties on delivery or any time thereafter. For all these reports show, sale and delivery to consumers by consignees may have been to occur in the future.

No contracts or other evidence of sale or delivery to third parties were offered in evidence. The ship's master or agent receives the bills of lading when cargo is released for discharge, but neither Amtro nor Owners produced any evidence as to whether the consignees or the alleged third parties endorsed or presented the bills of lading in order to receive the cargo.

Thus, there is no evidence supporting a finding that delivery from the vessel was to third parties and not to the consignees, so as to prevent exercise of the Japanese statutory lien. If such delivery was made, Amtro and Owners allowed it to occur, since they alone had the power to refuse delivery to third parties unless the demurrage was paid.

Representations of Schnitzer Did Not Prevent Exercise of Lien

The principal ground of the Court's refusal to enforce the condition specified in Clause 8 to Schnitzer's liability appears to have been the Court's conclusion that "Amtro was not in a position to effectively assert its lien on account of the representations of Schnitzer that the demurrage and unpaid freight would be paid" (R. 144). The Court had found that Schnitzer agreed to pay the sums when first contacted by Amtro on November 13, 1961, but subsequently declined responsibility on December 7, 1961 (R. 140-141). This finding was based (R. 141) on the testimony of Mr. Fletcher (Tr. 104-105, 113).

Accepting Fletcher's testimony, there is no evidence whatever that any such representations of payment deterred or prevented Amtro or Owners from exercising the lien (Specification of Error No. 11). Certainly Fletcher did not so testify. The evidence conclusively disproves the Court's conclusion that Amtro was not in a position to assert its lien on account of Schnitzer's alleged representations.

First, Amtro did nothing in the month following the commencement of demurrage to arrange for exercise of its lien. Amtro obviously knew that the vessel arrived in Japan on August 11 and was then ready to discharge (R. 104). It knew that laytime expired and demurrage began to accrue on October 9, 1961 (R. 105; Tr. 188), and that there would be a substantial delay before the vessel received a discharge berth. Yet Amtro did nothing whatever to arrange for exercise of the lien up to November 10, when it retained Mr. Fletcher to assert demands on Schnitzer (Tr. 53, 103).

Secondly, any representations of payment made by Schnitzer in the period November 13, 1961-December 7, 1961, as found by the Court, clearly did not deter Amtro from starting arrangements to exercise the lien. If such representations were made, Amtro did not rely on them, since Mr. Fletcher between November 20 and November 25 had agreed with Owners' New York attorneys that steps should be immediately undertaken to exercise the lien on cargo (Tr 110-111). Owners cabled Dodwell & Co., their agents, on November 24 to arrange for exercise of the lien (Dep. Ex. B-17; Ex. 44E, pp. 19-32), and Dodwell began the process on November 27 by advising th consignees of its instructions from Owners (Ex. 113; Dep. Ex. F-1, Ex. 44E, p. 15; Ex. 44G, p. 159). Dodwell consulted the McIvor firm about it on November 30 (Dep. Ex. B-20).

Finally, Amtro knew and communicated to Owners on December 7, 1961, that Schnitzer would not pay the demurrage, and Fletcher at that time gave instructions

to proceed with exercise of the lien (Tr. 113-114). This occurred four days after the ship began discharge on December 3, 1961 (R. 105). More than sufficient cargo remained on board for many days after December 7 for Amtro to have collected all sums due it by exercise of its lien. See evidence cited supra, p. 60. Dodwell & Co. itself on December 9 had recommended to Owners that exercise be delayed until 1,500 tons remained on board (Dep. Ex. F-4).

In short, anything Schnitzer may have said up to December 7, 1961, obviously did not prevent Amtro and Owners from exercising the lien at any time, had they desired to do so.

Conclusion

Amtro and Owners failed to meet their burden of showing inability to exercise the lien. Almost from the beginning, their efforts were directed toward collecting the demurrage and unpaid freight from Schnitzer, since they believed this would be less troublesome than exercising the lien as Amtro in Clause 8 of the charter party had agreed to do. The evidence shows that Amtro and Owners had no intent and made no good-faith effort to exercise the lien. They confined themselves to collecting "evidence" of their alleged inability to exercise the lien, for use in this case.

The lower court's decision has deprived Schnitzer of the benefits of the cesser clause and its incorporation in the bills of lading. Instead of forcing the consignees to pay the demurrage by exercise of the lien, Amtro

and Owners allowed the primarily liable parties to escape their responsibilities, and now try to put upon Schnitzer the risks and expenses of recovery at this late date against the Japanese buyers, without the pressure of any lien or possessory rights. There is no basis in law or in the facts shown in this record for allowing this injustice to stand by refusing to enforce the provisions of Clause 8 against Amtro.

III

The Court erred in holding that demurrage ran during weekends and holidays as defined in Clause 19 of the charter party.

(Specification of Error No. 19)

Rejecting Schnitzer's contention to the contrary (R. 114), the Court held that Clause 19 of the charter party did not exclude weekends and holidays not used from the period in which demurrage ran (R. 144-145). This resulted in an award for demurrage running continuously after the laytime expired on October 9, 1961 (R. 105). It is agreed that the demurrage award against Schnitzer of $57,757.10 would be reduced by $12,483, if the periods specified in Clause 19 were excluded from the demurrage period of October 9, 1961, through December 31, 1961 (R. 105-106).

Clause 19 of the voyage charter party (Ex. 2) provided:

> "Time from noon Saturday until 8:00 a.m. Monday not to count unless used, in which case actual time used to count. Time from midnight preceding holiday until 8:00 a.m. the day after

holiday not to count, unless used, in which case actual time used to count."

This clause follows Clause 18, which expressly dealt with computation of the laytime after which demurrage would accrue.

There are two periods "to count" relating to demurrage. The first is counting of the laydays to determine when free time expires and demurrage commences. The second is counting of the demurrage days. Clause 18 expressly deals with counting of laydays. Clause 19, a separate and independent paragraph of the charter party, applies to all counting, both laytime and demurrage days. Had Clause 19 been intended solely for purposes of calculating laydays, its language would logically have been placed in Clause 18 immediately after the phrase "Sundays and holidays excepted unless used, in which actual time used to count." Note that language in the original printed Clause 7 of the GENCON form (Ex. 75), stricken out of the NICTRIC charter (Ex. 2), provided for demurrage being calculated as "running days," i.e., demurrage running continuously after it began to accrue. Clause 19, to the contrary, excludes weekends and holidays from the demurrage days.

The Court held that any ambiguity in Clause 19 should be construed against Schnitzer as author of the charter party (R. 145). We have previously shown that there is no evidence of Schnitzer's authorship of this charter party or the KEHREA charter party (Ex. 76) on which it was based. See argument supra, p. 42; Specification of Error No. 2. Clause 19 of the KEHREA

charter party was identical to that for the NICTRIC, except that weekends and holidays in the KEHREA charter party were not to count even if used. There is no evidence in the record as to which of the parties insisted on or made this change after the KEHREA charter party was given by Schnitzer to the charter broker and sent by the broker to Amtro as a sample for discussion (Ex. 76, Tr. 176). There is no basis for holding Schnitzer any more responsible than Amtro for wording of the NICTRIC charter party.

Under Clause 19 of the charter party, weekends and holidays plainly were not to count in any calculation, whether of laydays or of days on demurrage. Thus, $12,483 for weekends and holidays after the expiration of the laytime was erroneously included in the demurrage award against Schnitzer.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

CARL R. NEIL
Of Proctors for
Schnitzer Steel Products Co.

APPENDIX A

TABLE OF EXHIBITS

Exhibit Number	Identified*	Offered*	Received*
1 and 2	5	5	5
4 through 13, inclusive	5	5	5
16	140	140	140
18	10	10	12
19	11	10	12
20	238	238	238
22	140	140	140
23	10-11	10	12
24A, 24B, and 25	140	140	140
26 and 27	11	10	12
29	140	140	140
32	7	7	7
33	17	17	17
34	26	26	26
35 and 36	17	17	17
41, 42 and 43	25	25	25
44A through 44J, inclusive**	133-135	135	[?] 136-137, 240-241; R. 184-186
45	88	88	88
46	17	17	17
47	18	18	25
48	26	26	26
49 and 50	27	27	27
51	35	35	35
52	89	89	90
53 and 54	141	141	141
56	9	9	9
58	59	59	59-60
59	117	117	117
60, 61 and 62	116	116	116

* All references are to pages of the transcript of the trial.

** See Appendix B for table of deposition exhibits.

Exhibit Number	Identified	Offered	Received
63	117-118	118	118
67	108-109	109	109
68	109	109	110
69	111	111	111
70 and 71	112	112	112
72	113	113	113
73 and 74	90	90	90
75	29	29	30
76	35-36	36	36
77	49	49	50
79	98	98	99
80	238	238	238
101	104	104	104
102	237	237	237
103	193	193	194
104	195	195	195
105	214	214	214
106	213	213	213
107 and 107A	214	214	214
109 through 112, inclusive	12	12-13	13
113	126-127	127	127
114	212	212	213
115	105-106	106	106
116	211	211	212
117	213	213	213
118	212	212	212
120	212	212	212
121	213	213	213
125	133	133	133
127 and 128	215	215	215
133 thru 140, incl.	235-236	235-236	
141	215-216	215	216
142A	217-218	218	218
142B	216	216	217
143A, 143B	217	217	218
144	218	218	218
145	236-237	236	237
151	27	27	27
152	27-28	27-28	28
153	28-29	28-29	29

APPENDIX B

TABLE OF DEPOSITION EXHIBITS

All of the deposition exhibits were presumably offered in evidence along with the depositions (Tr. 135), and presumably admitted in evidence (see Tr. 136-137, 240-241, R. 184-186). This table lists apposite each deposition exhibit the name of the witness, the exhibit number assigned at the trial to the deposition, and pages of his deposition in which the deposition exhibit was identified or discussed.

Dep. Ex. No.	Witness	Trial Ex. No.	Pages of Deposition
F-1	Saishoji	44E	16-17
(same as Ex. 113 at trial)	Main	44G	159
F-2	Saishoji	44E	17-18
	Main	44G	159
F-3	Saishoji	44E	17-18
	Main	44G	159
F-4	Saishoji	44E	20-22
	Main	44G	171-172
F-5 through F-18, inclusive	Morgan	44F	74-75
F-19 and F-20	Koizumi	44H	187-20
F-21 and F-22	Koizumi	44H	187-22
F-23	Koizumi	44H	187-23
B-1	Saishoji	44E	41-42
B-2	Saishoji	44E	42
B-3 through B-8, inclusive	Saishoji	44E	52-52A
B-9 through B-13, inclusive	Morgan	44F	90
B-14 and B-14A	Saishoji	44E	122
B-15	Saishoji	44E	123
B-16	Saishoji	44E	20, 123
B-17	Saishoji	44E	19, 132
B-18			
B-19	Main	44G	177-2
B-20			

Dep. Ex. No.	Witness	Trial Ex. No.	Pages of Deposition
B-21			
B-22	Main	44G	158
B-23			
B-24, B-25	Main	44G	177-1
B-26			
B-27	Main	44G	177-1
B-28	Main	44G	177-4
L-1	Tanikawa	44J	231
L-2	Tanikawa	44J	229
L-3	Tanikawa	44J	233
L-4	Tanikawa		
Com. Ex. 1	Tanikawa		

Exhibit Number	Identified*	Offered*	Received*
Exhibit Number	Identified*	Offered*	Received*

Dep. Ex. No.	Witness	Trial Ex. No.	Pages of Deposition